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ALIMONY

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FOREWORD

Bouvier's *Law Dictionary* defines alimony as, "the allowance which a husband, by order of court, pays to his wife, being separate from him, for her maintenance. . . . It is also commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce." In general there are four conditions which must be satisfied before an order for permanent alimony is granted: a legally valid marriage; the legal continuance of that marriage; a separation between the spouses, not on a voluntary basis, but by judicial decree; the legal innocence of the petitioning wife. These and related rules of law are found in the compiled statutes of the various states and the published opinions of the respective appellate courts which interpret the legislative intent and apply the principles derived therefrom in the solution of specific cases.

The real forum in which the facts of the cases are fought out is the trial court. The records of such controversies are to be found in the files of the clerk of court, the law offices, and the social agencies of the community. The entire problem cannot be studied with a view to evaluating the present substantive rules and procedure until all the necessary facts are available. Efforts to secure the details of cases from lawyers and social workers are made difficult by the confidential nature of the information and the scattered condition of the records. A monumental study of the data in the office of the clerk of court is contained in two volumes by Marshall and May prepared under the auspices of the Johns Hopkins Institute of Law and entitled respectively, *The Divorce Court—Maryland* (1932), and *The Divorce Court—Ohio* (1933). The figures compiled in this study serve both to dispel some erroneous conceptions concerning alimony and to reveal the seriousness to the community of the problems its administration presents. For example, it is shown that, of 2,500 cases in Ohio between July 1, 1930, and December 31, 1930, in which the wife sought financial relief results were obtained on the basis of the following percentages: property adjustments, 18.6%; awards of gross amounts, 10.5%; awards of counsel fees, 10.9%; awards of periodic payments, 23.0%. Women with children were successful in securing money or property awards much more frequently than those who were childless. However, the average weekly award to the childless wife was $11.66 while that for the support of wives and children was only $9.04 per family. Of the lump sum awards of known amount only twenty-five were large enough to provide, at 5% interest, a continuing income of $4.00 per week; and only four produced $10.00 per week. The statistical

data do not show any extensive tendency to foster an "alimony racket." It is clear from the volumes from which these excerpts are taken that the entire problem is substantial; that it reaches many social and economic classes; that, in addition to a comparatively few cases where the accusation of a "racket" may be made, there are many in which the funds provide only a meagre basis for support of wife and children.

As the symposium is addressed to both a legal and non-legal audience it seems appropriate to provide, in the two opening articles, a sociological, as well as a legal, background. Mr. Kelso, under the title *The Changing Social Setting of Alimony Law,* has considered the philosophy of alimony in the light of altered domestic and economic conditions. Mr. Vernier and Mr. Hurlbut perform a somewhat similar service on the legal side in *The Historical Background of Alimony Law and Its Present Statutory Structure.* After sketching the ecclesiastical origin of many of the concepts now in use by the courts, they summarize the contributions which have been made by legislatures in the United States.

If one, *de novo,* were creating a system of alimony law, it would be necessary to determine whether the theory of administration should be based on either of the two extremes of unrestrained judicial discretion or rigid legislative limitation or upon some compromise set of rules which might be described as "loose" or "elastic" depending upon the bias of the observer. In evaluating the sociological worth to the community of the present system one cannot escape the challenge of the prevailing system of judicial discretion and the next three articles accept it.

Mr. Cooey, in *The Exercise of Judicial Discretion in the Award of Alimony,* has inspected a cross section of the reported decisions of appellate courts which were called upon to determine whether the trial judge in making an alimony award had abused his discretion. The result is a disclosure of the legal guide posts which trial courts accept as significant factual points of departure in the making of decisions or as self-imposed restraints to prevent abuse of this judicial power. It is interesting to consider realistically how far such considerations do or should control.

Mrs. Daggett's paper is entitled *Division of Property upon Dissolution of Marriage.* In it she compares the rules for division of marital property upon divorce as they have developed under the common law system of marital property with those in force in Louisiana and in those western states which, like Louisiana, have borrowed the community property system from the civil law. She condemns that dependency of property rights on judicial discretion which the common law system permits and deplores the infiltration of common principles in the western community property states, finding the most satisfactory solution in Louisiana's combination of rigid rules for property settlements with judicial discretion in the award of periodic alimony payments.

Mr. Desvernine, writing on *Grounds for the Modification of Alimony Awards,* reports on his study of cases in which appellate courts have reviewed the action of trial courts in passing upon applications for modifications in alimony awards already

in existence. Again the query is presented as to how far such "Grounds" do or should affect the untrammeled personal reaction of the judge.

Mr. Jacobs, in *The Enforcement of Foreign Decrees for Alimony,* discusses and analyzes the difficult problems presented by the cases in which the courts of one jurisdiction have been called upon to decide to what extent they would—and, under the Full Faith and Credit Clause, must—give effect to an alimony award rendered by the court of another state.

Mr. Pokorny, under the title *Practical Problems in the Enforcement of Alimony Decrees,* illustrates the operation of an important innovation in the handling of alimony cases: the supplementation of the machinery of the trial courts by an administrative agency investigating the condition of the parties and supervising compliance with the judicial orders. His office, Friend of the Court, in Detroit, is another source of realistic material as to the nature and extent of such problems.

Mrs. Peele, in *Social and Psychological Effects of the Availability and Granting of Alimony on the Spouses,* draws her examples from still another factual background: the records of legal aid societies and social agencies.

A word should be said in explanation of the inclusion of two articles which provide a basis for the comparative study of our alimony law. Alimony problems examined solely against a background of the American family tend to give the reader a one-dimensional approach. By considering corresponding legislative enactments and judicial pronouncements in relation to the modern family in France and Germany two additional dimensions are added and a fundamental conflict in the nature of alimony as a juristic concept, more clearly perceived. Miss Mitchell describes *Alimony in French Law;* Mr. Mankiewicz, *The German Law of Alimony Before and Under National Socialism.* With that interest in basic jurisprudential problems common to continental legal writers, both devote attention to the question whether alimony is grounded in fault or in status, a matter which the new German law places in special relief. If the innocent wife is entitled to damages from the guilty husband, the question of fault becomes significant. If, on the other hand, it is regarded as sociologically wise that the state should require members of the family, even in the event of its dissolution, to support one another rather than permit them to become dependent upon public charity, a different set of issues is raised. Such problems cannot be disregarded by those seeking a better system of alimony law.

No special consideration has been given in this symposium to the problems relating to the custody and support of children of divorced parents. These matters will constitute the subject of some future issue of this quarterly.

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THE CHANGING SOCIAL SETTING OF ALIMONY LAW

ROBERT W. KELSO*

The ultimate validity of any principle of law, and consequently of all written rules of public order based thereon, rests upon social need. It is the aim of all men, related to each other in that nexus of physical and mental contacts which we call "society," to live happily and at peace. To that end is the conduct of the individual regulated. Through the long experiment of trial and error, neighborhood and tribal custom works itself out into principles of personal conduct. The resulting body of the unwritten law becomes the self-imposed regimen of a free and self-determining people.

If this reasoning be sound, it must follow that changes in social need call for corresponding changes in rules of law; that the law must be a changing, growing structure, responding to those constant alterations in environment which society experiences as a result of man's continuing conquest of the forces of nature and the resources of the earth. Law is not static.

Careful perusal of the following articles in this symposium will reveal the origin, the historical development and the legal reasoning upon which the modern law of alimony rests. It is the purpose of this article to explore with some thoroughness the social setting surrounding this legal principle, with intent, if possible, to identify those social determiners which justify the rule and those which may indicate change: and finally to identify such change as seems advisable in the premises.

Concerning this social matrix for the law of alimony three considerations call for some analysis. The first is the function and importance of the family; the second, the principle of self-support in a free people; and the third, the question whether the status of woman under coverture has so for changed as to call in itself for change in the present law of alimony.

And first as to the family as an institution in human society. Modern man's acceptance of monogamy as the best form of family structure is often said to result from his increasing sense of morality. In all probability his alleged increase in moral appreciation has nothing to do with his attitude toward the family; or if it does, it is result rather than cause. The mating of a single pair and their continuance in ex-

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clusive mated relationship tends to guarantee continuous and devoted attention to the wants of their offspring throughout its inordinately long period of helplessness. This service of parent to child is a necessity of the species. The best way to get a "good standing foal" and to guarantee its upbringing to competence is the best mating arrangement, morals aside. Polygamous or promiscuous matings might and probably would increase numbers of offspring, but they could not guarantee that long and faithful attention to helpless infancy so necessary to racial and social improvement.

If the family then is to consist of one male and one female with the offspring, issue of the mating—because this is among all possible forms of mating the most likely to advance society—it must follow that dangers and impairments of this monogamous family must be fended off and a cloak of protection placed about the institution to guard it. Of all things else, the protection of man's breeding lair is his deepest concern. Wherefore we say with truth that the family is the basis of society.

The far ramifications of the law of persons and of property aim to safeguard the institution of the family: and our moral tenets as distinguished from law tend to the same end. It is because our increasing knowledge of heredity warns us of the care needed in mating; the dangers of breeding from the in-blood; the destructive effect of mental subnormality when of hereditary origin, that chastity in both spouses is a virtue. We often explain it on other grounds, but this is the real reason.

It is a logical step from social recognition of the family as a vital foundation to the requirement that every reasonable effort must be made within the family to keep it independent and self-supporting. In earlier times the husband had all the property, and all the opportunity to gain property. The wife was the housekeeper, rendering her services in childbearing and in home duties, without compensation. Obviously it must fall to the husband to support the family. And the State from the beginning has done its best to see to it that he did his duty.

He was responsible for the wife's debts and even for her torts. She was a complete dependent upon her husband and, except in matters of her own wrongdoing, could demand of him the full measure of support. It was in this era of total wife dependency and nonentity at law that the equitable rule of alimony sprang up in chancery.

Marriage in that age was a sacrament, permitted by the Church which was the State, conceived in spiritual bonds, hedged about by dogmatic commandments of ecclesiastical rule.[1] Transgression of the moral precepts enjoined upon the married pair was the abiding fault in marital conduct. It was sin. Economic insufficiency, mere social inadequacy, unhappiness and misery too deep for tears—these were not among the conditions that were correctable, unless mayhap they were coupled with someone or other of the forbidden sins. Hence the persistent rule that he or she who was not completely innocent of moral offense was denied redress.[2] Only the innocent

[1] See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (1927) 336.

[2] See Bradway, *The Myth of the Innocent Spouse* (1937) 11 TULANE L. REV. 377, at 379, and cases cited.

spouse had standing in court. American statutes are today still surcharged with this earlier concept of guilt and innocence in issues of divorce and alimony.[3]

The ecclesiastical doctrine of alimony was no more than an enforcement of the husband's duty to support. The wife could not enforce it at law: equity found a way. The doctrine thus set up related to the married status only, and therefore had no place after a decree of absolute divorce. At most it gave remedy to the wife—never to the husband—who was separated from her spouse for cause.

Why should the law strive specially for the enforcement of the husband's duty? Legal decrees do not mend attitudes of hostility and unhappiness. Granted that the marriage tie is precious to the State as signifying the possibility of new citizens, can an order to the husband that he must do his duty—already understood—or suffer penalty bring about any sweetening of the strained condition of things? This query brings forward the second consideration in this discussion, namely, how vital is individual self-support in a free nation?

In this present year, when government is expending such large sums in the relief of persons dependent through lack of employment the question of self-support may well be pondered.[4] The individual who is dependent upon somebody else for food, clothing and shelter may, and often does, lose his self-reliance and his will to go forward in life. But more important even than this result is the harm that may come to him as a free agent in the exercise of his rights as a citizen. If the government supports him it must take the means of that support from some other citizen, almost invariably a citizen who has earned it by hard work, and who, in addition to that earning, has been supporting his own family as the law requires. The individual thus aided is in grave danger of losing his right to independent decision at the polls. But the greatest danger of dependency is its menace to personal freedom, and loss of the will to strive for independence. Its ugliest manifestation is the resulting insecurity of home life.

A government which exists by consent of the governed, and in which the will of the people is the final expression of power, can exist to its fullest degree of effectiveness only when each individual within it is as free and independent as possible, and as free as possible from the burdens properly belonging to other individuals. Self-support is the bed rock of freedom under law, and consequently the foundation of empire based upon that freedom.

Economic insecurity due to uncertainty of income and of the job by which that income is earned, is the primal discouragement in home building. Studies in marriage frequency indicate a close correlation between the frequency of marriage and the business cycle upon which security on the job depends. Indeed the curve of mar-

[3] Among the many expressions on the point is that in Capell v. Capell, 164 Va. 45, 49, 178 S. E. 894, 895 (1935). The court said, "A decree for alimony is more than an order for the payment of money. A husband who has wronged his wife must continue to contribute to her support." In this case the decree was for absolute divorce.

[4] The total spent by governments in the United States for emergency relief and work relief, 1933 to 1938 inclusive, was $17.5 billion. See Report of U. S. Senate Committee on Unemployment Relief (1939) Soc. Sec. Bd. Release No. 711, Feb. 12, 1939.

riage frequency follows the business curve with almost complete parallelism.[5] The likelihood of income enough to support home and children is the harrowing "if." It harries the young who plan marriage: it haunts them as man and wife: it is the specter that looms in the form of anticipated dependency when the marriage turns out badly.

Looking squarely at the conditions surrounding the American home, it becomes apparent that family life is not a moral state of grace: rather it is a social status necessary to the right perpetuation of the species, cast in a setting of stern economic limitations. The chief party in interest is the State, which never appears formally as a party litigant and is too often forgotten in the reasoning of the custodians of the law. Nevertheless the family is the human institution most vital to the perpetuation of the race, and its sound ordering the consideration of deepest social concern.[6]

It may be profitable at this point to ask the social as distinguished from the legal question, who are the real parties in interest in an issue of marital trouble involving alimony? The chief and foremost party in interest, as just noted, is the State. It has sanctioned the marriage. It has laid down the terms of the contract into which the spouses enter; has maintained a constant oversight of its performance, regulating it by the law of the domicile rather than that of the contract itself. It alone permits its dissolution, and then only by solemn decree. The life of the State is made possible only through the propagation of succeeding generations; and its social validity depends directly upon the physical and mental competence of the offspring propagated and nurtured through the instrumentality of the family mating.

Next in interest come the children, if any. These are the true assets of the State. For as Emerson has phrased the concept, "The true test of civilization is, not the census, nor the size of cities, nor the crops—no, but the kind of man the country turns out."[7] It is the child who is by definition dependent and helpless. He must be protected against privation at all hazard, let the cost to other parties in the issue be what it may. It was for him as a new being in society and a prospective citizen in the State that the marriage was entered into. It was for him that the State has taken such care in the fixing of the marriage terms and in the oversight of the marital conduct of his parents. When all else has ceased to be of worth or validity, it will be he who stands out, disadvantaged and a dependent upon the bounty of the State, to develop into an adulthood of competence in spite of the odds—or of incompetence, perhaps crime, because of the odds.

And finally come the actual parties litigant, the spouses seeking to settle their difficulty by means of the equitable decision of the State through its instrument, the court. These are the parties who make all the claims and suffer all the legal penalties. It is they of whom the law has said, "he that cometh into court must come with clean

[5] For a striking illustration of the coincidence of these two curves, see the supplemental statistical survey issued in January, 1939, by the University of Buffalo, Bailey and Carpenter, *Marriage and Economic Fluctuations in Buffalo, 1921-1938*, 14 BUREAU OF BUS. & SOC. RESEARCH, No. 5a.

[6] As some slight indication of the public stake in the problem of family support, it is uniformly held that the parties to a decree for alimony may not deprive the court of its continuing power over its terms by any subsequent agreement modifying or abrogating it. See (1935) 49 U. S. L. REV. 561-569, and cases cited.

[7] EMERSON, SOCIETY AND SOLITUDE.

hands." And it is they alone who stand out in the minds of legislatures where they cling to the idea of "guilt and innocence" in declaring the rights and obligations in divorce litigation.

From a social point of view, therefore, the court in the contemplation of divorce and disposition of property of the spouses should consider, first, the well-being of the State—the whole people; second, and hardly separable from the first, the support and well-being of the children; and third the support of the spouses and the equitable division of their property involved in the marriage. In this light moral guilt or innocence is of little importance beyond the possible but doubtful deterrent effect of the "rule of the innocent spouse" upon potential offenders against marital duty.

If these preliminary considerations are sound it must be obvious that the struggle for a living by the individual, and for standards of living by society, requires that marriage, which is the legal sanction for the family, be freely entered into and freely dissolved, within the limits of sound public policy. And these results must be made possible without shaking the structure of the whole of society, identified in this article by the word "State." In all ways feasible the State must encourage marriage; cloak it about with protections; and recognize the need of its recession in the event of failure to meet the objectives for which it exists.

Yet in the face of this necessity for the encouragement and protection of our basic social institution—identical in condition and function the world over—we find an astounding confusion of thought arising out of the anchorless attitudes of courts and legislatures throughout the nation.

The historical remains of the older philosophy of the Church as the State still makes for marked confusion in legal rules of conduct on the one hand and our moral tenets resting upon attitudes, emotions and beliefs on the other. It is because of this confusion chiefly that we find the statutes of our several jurisdictions varying markedly in their appraisal of what constitutes sound public policy in the legal sanctions of marriage; as to who may marry; as to how the contract may be entered into; as to how regulated; and in particular as to how and under what conditions it may be dissolved. This astonishing range of variation in our laws governing marriage and divorce is a tribute less to provincialism than to ignorance of the true philosophy of social order.

One marriage in six in the United States results in divorce.[8] This is the demonstrated degree of mésalliance. Social workers know how high above this percentage rises the total of separations and of marital unhappiness and distress without separation. Yet we find one of our jurisdictions (South Carolina) refusing to sanction dissolution of marriage by divorce. Other jurisdictions find moral and ethical behavior the criteria of virtue in marriage. Seldom does the law—and then only in a fragmentary way—recognize the hard fact that economic distress, the filth of bad housing, the meagerness of home interest, the cruelties of social ostracisms, and over all the black shadow of dire poverty are causes of conduct for which moral or immoral attitudes are seldom more than sequelae.

[8] Ogburn, *The Family and its Functions*, 1 RECENT SOCIAL TRENDS (1933) c. 13.

If a spouse is "good" according to ecclesiastical tenets of morality he may, by the law of some jurisdictions, insist upon the continuance of a status in family life that is in fact anti-social, since the State cannot divorce him and neither can his spouse. If his conduct offends those same tenets he may be, and often is, barred from claiming such status as the conditions of economic life require for the protection of society. For instance, the wife who offends the moral tenets of the day may not claim that support without which she may become a public dependent or a prostitute.

So long as we fail in our legal structure to take account of the economic limitations upon conduct that change from one epoch to another—indeed from one single decade to another—we remain in danger of maintaining a social order dictated by a majority group of believers to control those who by their conduct are apostate. The problem of the stomach, the hungry personality struggling for some enlargement or expression of itself—the outraged sense of justice rebelling against oppression, the sick mind struggling to readjust itself—all these are but the circumstances of life and are not admissible in evidence.

The record of one childless couple in every six matings in the United States today argues no physical change in the fecundity of the race. It arises from other causes, some of which must certainly result from the legal strictures upon change in the marriage status in the face of sound social expediency.

If it is true that the marked variations in American statute laws governing marriage and divorce have no foundation in social policy or the logic of the law, is it practicable to find common ground upon which legislatures should act in the development of the written law of this subject?

It is here submitted that a frank and straightforward attitude toward the plain circumstances of living in America today would improve the legislative concept of family life. A vision of a self-supporting population constituting a purposeful society would throw emphasis upon the need for individual self-support, affording to the law of alimony a concept now largely neglected.

The third inquiry into the social setting of the family here proposed is embodied in the question: has the position of woman in the marriage relation so far altered as to render change advisable in our legal attitude toward alimony?

When the ecclesiastical courts first devised the equitable remedy of alimony, the wife had no standing before the law courts: chancery discovered her plight to be one of lack of remedy at law and lack of means to protect herself even in the event that a day in court could be accorded her. It gave her the right therefore to sue in equity for protection against the husband, even to the extent of separation from bed and board; and, in order to make that decree practicable, called upon the husband to continue to support her, wherever she had no means of support; but only in such case of need. This was the limit of protection granted her.

It was never contemplated that she could demand or secure a complete severance of the bonds of matrimony. Much less did it contemplate her continued support after such abrogation. As a wife she was suffering an injustice. The husband was an offender against some one or more of the moral obligations laid upon him by the

Church. His offense was serious enough to justify his wife's separation from him *a mensa et thoro*. She was innocent of any violation of the moral obligations placed similarly upon her. As punishment he must lose the consortium yet go on with the obligation to support her. The children of the mating seem never to have been visible above any horizon of the law.

But since that early day the conditions of living and labor attending the family's struggle for social competence have changed materially, and with that change has come a corresponding change in the position of the woman under coverture. The older pattern of the family hearth in a cottage on the heath—a bucolic existence set in rustic peace—has given way to a mechanized world in which man has largely traded his assured dependence upon the soil for the drab uncertainties of a job set in an urban struggle for mere existence. In this new environment the wife must toil to keep the semblance of home; but she must do more. In order to eke out the family income she must go outside the home and labor in common with husband and children at a job. To an increasing degree she must take her turn at bread winning.[9] And in this extension beyond the walls of home she makes constant and more or less intimate contact with other persons, both men and women. She receives thereby a social enlargement which extends her interests and sympathies and emotions far beyond the limits of her own marital fireside. More anciently she was mainly a consort, kept in her husband's home for purposes of companionship and propagation. Now she has become a social person, quite equal with her husband, thoughtful of civic and public affairs, concerned with matters political, interested in the broader things of life. To an increasing degree today she takes the initiative in family support and family progress.

So completely has she become the coordinate and collaborator with her husband in family support that the law has gradually, by one step after another, recognized her parity. Thus she may now hold property independently of her husband.[10] She may enter into contractual relations independently of him.[11] She may enter into contracts directly with him.[12] She may sue him and be sued by him in matters not directly touching the marriage contract.[13] Though the words of the marriage ceremony still admonish her to "love, honor and obey" him, she is not obliged to do any one of those things; and the law is powerless to compel her to do so.[14] She may leave him and sue him for absolute divorce upon a multiplicity of grounds touching happiness and personal freedom rather than mere marital faithfulness.[15] She may vote and her secret ballot is none of his legal concern. From her old position as an identity merged in him and not separable from him, she has advanced to a position of independence in most respects fully equal with his. Whereas in the period when

[9] It is estimated that approximately one sixth of the married women of the United States work outside the home at an earning occupation, the proportion having increased sixfold since the turn of the century. For a careful summary of data on this head, see Breckinridge, *The Activities of Women Outside the Home*, 1 RECENT SOCIAL TRENDS (1933) c. 14.

[10] See SCHOULER, DOMESTIC RELATIONS (6th ed. 1905) §§145, 186.

[11] *Id.* §§ 227, 229.

[12] *Id.* §539.

[13] *Id.* §§627, 628, and cases cited.

[14] *Id.* §54.

[15] *Id.* §1067.

the law of alimony was largely shaped and fixed she had no property apart from her husband and had no means of securing help if she left him or called him to a legal accounting of his husbandry, today she has her separate property, and ways and opportunities at least as many, if not more, of earning a livelihood outside the home and independently of her spouse. The natural difference in sex and the abiding fact that it is she who bears and nurtures the offspring is nearly the only stable factor in the marital relationship as we find it today.

It is inevitable that this rise toward parity should alter the old justification for alimony. And by the same reasoning it is logical that the written law should have extended the principle of alimony to conditions of support after the marriage relation has been completely severed. Marriage having changed its complexion from that of a sacrament controlled by the Church to that of social status hedged about more by civic necessities and less by ecclesiastical precepts, it has become the effort of the law to keep the institution of the family vigorous and effective by becoming more lenient with both spouses and less demanding in its admonitions of virtue and obedience. And it is natural under these conditions also that the trend of the written law should be to leave the disposition of property on divorce, together with the terms of the decree for alimony, more and more to the discretion of the court.[16]

It would seem, further, to be a reasonable consequence of the changed social position of woman that attitudes toward divorce would show decreasing disapproval. People generally realize the economic strain that now attends family life. They see the wife forced to carry on a tour of labor or of professional work outside the home. They find the husband harassed by the struggle for means of support of himself and his family. Hence they look with some leniency upon the parties when quarreling and discontent arise in the home. They are less prone to condemn the wife for seeking divorce or the husband for failing to provide adequate support. Divorce is no longer followed by social ostracism. That which formerly was looked upon as fault and sin, tends nowadays to be viewed as misfortune calling for sympathy. As a consequence of this changing attitude there is a growing feeling that the right to alimony should not be used as an instrument with which to punish a guilty husband; but rather should relate itself definitely to the wife's need and should in no case extend beyond the moment of the wife's remarriage.[17]

Viewing the social circumstances attending the family we find the human breeding lair to remain in its essential needs and objectives just what it has been since the beginning of human experience. But the institution of the family in its social setting has greatly changed with economic and political changes. The family is the primal necessity of society.

Further we find the self-sustained family to be a requisite to social order in a free people. Independence of support by others is a prerequisite to continued independence. Wherefore it becomes a basic purpose in the public ordering of family affairs

[16] See 2 VERNIER, AMERICAN FAMILY LAWS (1932) §105.

[17] See Deitrick v. Deitrick, 99 N. J. Eq. 711, 134 Atl. 338 (1926); Cropsey v. Cropsey, 104 N. J. Eq. 187, 144 Atl. 621 (1929); Southard v. Southard, 262 Mass. 278, 159 N. E. 518 (1928).

to encourage self-support and to avoid by all means the dependency of the family or of any of its members upon the public.

And finally in our examination of the changing conditions of family life we discover almost a complete change in the status of the woman under coverture. No longer is she merged with her husband, powerless to do aught but obey, and in the last extremity appeal to the Church for the equitable remedy of separation and continued support from her husband. She stands forth as his equal before the law. She is appraised his equal by public opinion. And as her rights are looked upon as equal, there is a strong tendency to set her duties on a similar plane of equality. The growing feeling of public resentment against suits brought for breach of promise of marriage in all probability has its roots in the same decline of sympathy for the defenseless woman, no longer without defense.

With this social background in mind it is useful to note briefly the apparent trend in the written law of alimony and in the attitude of courts charged with enforcement. We have already noted its origin as an equitable remedy for the position of the wife when conditions grew intolerable and the husband was an offender against moral tenets. It was not available to her unless she were in need. Nor could she claim it except she be without sin in respect of her marital relations. It required the husband to continue her support *pendente lite*.

But as the economic changes in living and labor, already noted, came about the wife's changed status was gradually recognized by legal remedies to the degree even of complete severance of the marriage tie. And in spite of the ill logic of demanding that the husband support her after she ceased to be his wife and the marital situation was completely severed, it was an easy step to insist, by provision incorporated in the divorce decree, that the former husband should go on supporting the erstwhile wife: and this even after she should have married again.[18]

The distinct tendency in the law of alimony is to extend it to the conditions of absolute divorce, but to leave in the discretion of the court the amount of the allowance.[19] And there is apparent a still further aspect of change, namely, in the direction of merging the specific question of alimony in the broader problem of complete disposition of the property of the parties, joint and several, upon divorce.[20] There is even an increasing trend to allow alimony to the husband in needy circumstances.[21]

In its present stage therefore we find reasoning in the law of alimony divided into two well-defined and conflicting camps, the one adhering to the historical view, the other yielding old theory to the social demand for new practice. These two views, well expressed by Mr. Justice Cullen in the case of *Wilson v. Hinman*[22] are in substance

1. That alimony is a right of the same character as the right of support lost by the dissolution of the marriage.

[18] For statutes extending the right thus far, see 2 VERNIER, AMERICAN FAMILY LAWS §105.
[19] *Id.* §104.
[20] *Ibid.*
[21] *Id.* §§62, 109.
[22] 182 N. Y. 408, 75 N. E. 236 (1905).

2. That alimony is a settlement of the property rights of the parties and a distribution of the assets of the quasi-partnership hitherto existing.[23]

The courts still struggle to define the nature of alimony. First they declare that it is not property in the sense that a decree therefor creates a debt.[24] Then they withdraw from this extreme position to the extent of holding that alimony is property, to be sure, but property of a peculiar kind, calling for the special protection of the court. And this finding provides justification for insisting that it may under no circumstances be diverted from its original purpose. Even the deceased wife's estate is permitted to collect alimony due her in her lifetime, though there is no right to it after the husband's death.[25]

Neither can it be reached by the wife's creditors. It is not discharged in the husband's bankruptcy. Nor can the husband set off against it a debt owed him by the wife.[26]

These wavering views look suspiciously like mere groping on the part of the courts. It is likely that the key to a sound philosophy of alimony will be found only in the social analysis of the family as the primary institution in the State.

Obviously the obligation of a husband to support is not merely a duty sounding in dollars. Obviously, too, the wife should not be the sole arbiter of the disposition of her support thus ordered by the court. It must apply to her support, claims of creditors to the contrary not withstanding. So long as the substantive law continues to cling to the idea that the marriage relation shall be assumed to continue on, through the pressure of requirement to support, the innocent spouse holding the right and the guilty spouse receiving the punishment, just so long will there continue to be confusion in the reasoning behind the adjustment of the marital obligation to support.

Out of these considerations arise three suggestions, at least, for improvement in the law of alimony: two in the substantive law itself and one in the method of its administration.

1. Considerations of guilt or innocence should be eliminated from the law of alimony. The difficulty which alimony seeks to solve is an economic question of reallocating the property out of which support should come during the married state to the circumstances of temporary litigation or permanent dissolution of the old relationship. To consider it a reward of merit for the virtuous or as a punishment for the wrong-doer, is to misconstrue the premises.

In this light discretion should rest with the court to make all necessary adjustment of the property of the spouses to see to it that the maximum of support should be provided for, independent of public tax funds. And in so doing it should be a principle of the law that the welfare of the children is to be served before that of the contending spouses. It may do violence to precedent in legal practice to require that

[23] For a helpful discussion of the nature of alimony, see Munson, *Some Aspects of the Nature of Permanent Alimony* (1916) 16 COL. L. REV. 217, 222.

[24] Faversham v. Faversham, 162 App. Div. 521, 146 N. Y. Supp. 569 (1914).

[25] Burns v. Klug, 29 App. Div. 192, 195; 113 N. Y. Supp. 325, 328 (1908).

[26] Wilson v. Hinman, *supra* note 22.

support money for the children should be paid into court or to a third party in the event that the court is not satisfied with the efficiency and reliability of the wife, but socially speaking there might be much to be gained by that course.

2. The idea that alimony goes to the wife and is so permanent that she may go on receiving it after a second marriage, comports little with the true purposes of sound procedure. Alimony should be an adjustment of the property of the pair jointly and severally to serve the needs of the State and the children consonant with the least interference with individual freedom in the spouses that may be practicable. To allow alimony permanently, regardless of the need for support or of subsequent marriage, harks back to the idea that only the two spouses are concerned in the issue, of whom one is guilty and must pay a penalty. The power should rest with the court to revise, rescind or otherwise alter any of its decrees touching the wind-up of the affairs of the broken marriage whenever social expediency renders it wise—and this without waiting for the appearance and entreaty of one or both of the spouses.

3. Finally, as to administration of the law, the settlement of marital difficulties by decree based upon legal reasoning alone is crude and outmoded in the light of present-day social needs. The court in the average divorce case is quite unable to fathom the cause of the difficulty sufficiently to set up a plan for the protection of the State and the well-being of the parties. In most cases the issue is not clear-cut. In view of the fact that the State holds a vital stake in every marriage, the trial of all marital troubles, seeking justice for the parties, should be carried on as a scientific specialty, in a special court dealing constantly and exclusively with domestic relations. Such a court should have complete and exclusive jurisdiction over such causes and adequate jurisdiction over the parties involved, with full power to dispose of the entire issue, including alimony. The court should be given discretion to alter or otherwise amend its decrees for alimony in the interest of the State and the parties, especially the children.

Such a court cannot function effectively if limited to the customary adjunctive services of bailiffs, clerks, counsel and jury. It must have technical services of which two branches are now well recognized and fully defined and tested. These are, first, the psychiatric examination of individuals, so necessary in family trouble cases as an aid and a preventative in behalf of the parties and the most intelligent service to the children; and second, skilled social case work to carry out the disposition made by the court.

It is here submitted that complicated modern life calls for marked intervention of the State in marital affairs to protect society against waste, inefficiency and preventable loss in the conduct of its most vital institution. This intervention should take the form of scientific analysis of family problems and their skillful disposition to the advantage of society and, if may be, of the parties. And if it be said that this suggestion is a long hark from the idea of a tribunal of justice among English-speaking men, the answer is that the law exists to protect and further the social well-being, and that those instruments which the State sets up to further these purposes must keep abreast of the need, and change with changes in the problems they encounter.

THE HISTORICAL BACKGROUND OF ALIMONY LAW AND ITS PRESENT STATUTORY STRUCTURE

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ALIMONY IN THE ECCLESIASTICAL COURTS

Alimony in the unwritten law of England developed as a part of the law of divorce in the Ecclesiastical courts. Although that alimony with which we are now familiar is found in an essentially different background, the imprint of Ecclesiastical practice is readily perceived in both our case and statutory law. Prior to 1857, the Ecclesiastical courts applying for the most part the Canon Law exercised jurisdiction of matrimonial causes,[1] and consequently of the allowance of alimony.[2] Marriage was thought to be a sacrament and indissoluble.[3] Divorce *a mensa et thoro* was granted for adultery and cruelty.[4] This legal monstrosity, today called "judicial separation" and little desired by litigants, did not purport to dissolve the marriage but on the contrary contemplated the possibility of reconciliation. The Ecclesiastical courts also pronounced nullity sentences, peculiarly called divorce *a vinculo matri-*

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[1] On the general subject of divorce in the English law, see Bryce, *Marriage and Divorce under the Roman and English Law*, 3 SELECT ESSAYS IN ANGLO AMERICAN HISTORY (1909), 782, 822 *ff.*; 1 HOLDSWORTH, A HISTORY OF THE ENGLISH LAW (1903), 389 *ff.*; 12 *id.* (1938) 685; KITCHEN, A HISTORY OF DIVORCE (1912) c. IX; 2 HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 3 *ff.*; FIRST REPORT OF THE COMMISSIONERS TO INQUIRE INTO THE LAW OF DIVORCE (1853) 40 PARL. REPORTS 1852-1853; REPORT OF THE ROYAL COMMISSION ON DIVORCE AND MATRIMONIAL CAUSES (1912) 18-20 PARL. REPORTS 1912-1913.

[2] During the Cromwellian era and the temporary abolition of the ecclesiastical jurisdiction, it seems that the High Court of Chancery entertained alimony petitions. Setaro, *A History of the English Ecclesiastical Law* (1908) 18 BOSTON UNIV. L. REV. 102, 123; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) §1394.

[3] The power to dissolve a valid marriage for adultery was claimed by leading ecclesiastics in the sixteenth century, and it is said that for some years prior to the decision in Rye v. Fuljambe, Moore 683 (1602), men acted upon the belief that divorce for adultery left the parties free to remarry. See de Montmorency, *An Introduction to the History of Divorce*, REPORT OF THE ROYAL COMMISSION ON DIVORCE AND MATRIMONIAL CAUSES (1912) 20 PARL. REPORTS 1912-1913, app. 1, p. 18; Dibden, *Notes on the Reformatio Legum*, *id.* p. 42; 2 HOWARD, *op. cit. supra* note 1, 76 *ff.*; MACQUEEN, THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS (1842) 467 *ff.*

[4] 2 BURN, THE ECCLESIASTICAL LAW (9th ed. 1842) 501 l, *ff.*; POYNTER, DOCTRINE AND PRACTICE OF THE ECCLESIASTICAL COURTS IN DOCTOR'S COMMONS (2d ed. 1836) 64 *ff.* (13 LAW LIB.)

monii, which declared the marriage invalid *ab initio* because of some impediment existing at the time of the marriage.[5] For the dissolution of a valid marriage, resort was had to absolute divorce by private Act of Parliament.[6] This "privilege of the aristocracy" was the precursor of the Divorce Act of 1857[7] which ousted the Ecclesiastical courts of divorce jurisdiction, and which established the absolute divorce by judicial decree. The latter had already been accomplished in most of the American states.[8]

Permanent alimony in the unwritten law is an incident of the Ecclesiastical divorce *a mensa et thoro.*[9] In some respects the setting in which the alimony order was made seems rather remote today. Then, as now, pecuniary provision for the injured wife was necessary as a matter of social economy. Inequality of economic opportunity as a fact was not obscured by modern notions of "equal rights." Her technical legal status permitted such relief without resort to novel doctrines. In legal contemplation, the marital tie upon which the husband's legal duty to maintain her rested was not severed by the divorce decree. There were, however, other considerations present. The discriminatory common law scheme of marital property rights was in full bloom. Only very serious and aggravated types of marital transgressions entitled the wife to divorce. It is no wonder that her application for permanent alimony was treated with sympathy, and with liberality when the circumstances permitted liberality.[10]

The primary object of the order for permanent alimony was to provide continuing maintenance for the wife. In form at least there was no pretense of effecting a division of property. The order was invariably for periodic payments,[11] usually commencing at the date of the divorce sentence.[12] The amount of the award rested in broad discretion of the Ecclesiastical judge.[13] The ultimate considerations, of course,

[5] 2 BURN, *op. cit. supra* note 4, 500 d, *ff.;* POYNTER, *op. cit. supra* note 4, 30 *ff.* Prior to legislation of 1540 (32 HEN. VIII, c. 38) the nullity sentence in some measure served as a practical substitute for absolute divorce by reason of the application of grotesque doctrines regarding impediment by precontract and the forbidden degree of consanguinity and affinity. See 2 POLLOCK AND MAITLAND, HISTORY OF THE ENGLISH LAW (2d ed. 1899) 385 *ff.;* 2 HOWARD, *op. cit. supra* note 1, at 54 *ff.*

[6] "Before 1715 only 5 such bills were known, between 1715 and 1775 there were 60, between 1775 and 1800 there were 74, between 1800 and 1850 there were 90." 1 HOLDSWORTH, *op. cit. supra* note 1, at 390 n. 6. See MACQUEEN, *op. cit. supra* note 3, at 466 *ff.;* 2 HOWARD, *op. cit. supra* note 1, at 102 *ff.*

[7] 20 & 21 VICT. c. 85.

[8] 3 HOWARD, *op. cit. supra* note 1, at 3 *ff.*

[9] Cursory statements of the law of alimony in the ecclesiastical courts will be found in AULIFFE, PARERGON (1726) 58 *ff.;* 2 BRIGHT, HUSBAND AND WIFE (1849) 357 *ff.;* 2 BURN, *op. cit. supra* note 4, at 505 *ff.;* GODOLPHIN, REPERTORIUM CANONICUM (3d ed. 1687) 508 *ff.;* POYNTER, *op. cit. supra* note 4, at 85 *ff.*

[10] "The delinquency of the husband is now established; the wife is the injured party; she is separated from the comfort of matrimonial society, from the society of her family, not by Act of Providence, but by misconduct of her husband; she must be liberally supported." Sir John Nicholl in Otway v. Otway, 2 Phill. Ecc. 109, 161 Eng. Repr. 1092, 1093 (1813). There are no regular reports of the ecclesiastical courts prior to the three volumes of Phillmore beginning in 1809. There is no reason to believe that the reported decisions do not reflect the traditional attitude of the ecclesiastical judges.

[11] "Alimony is allotted for the maintenance of a wife from year to year." Wilson v. Wilson, 3 Hag. Ecc. 329, 162 Eng. Repr. 1175 (note) (1830).

[12] Cook v. Cook, 2 Phill. Ecc. 40, 161 Eng. Repr. 1072 (1812); Kempe v. Kempe, 1 Hag. Ecc. 532, 162 Eng. Repr. 668 (1828).

[13] ". . . it is only upon a strong difference of opinion where the Court of Appeal would be disposed to disturb the sentence." Cooke v. Cooke, *supra* note 12, at 41, 161 Eng. Repr. 1072.

were the needs of the wife and the ability of the husband to pay.[14] The marital delinquency of the husband standing established, the amount was usually greater than that given as temporary alimony.[15] While provision for the custody and maintenance of the children was without the province of the Ecclesiastical judge,[16] the husband's obligation to support the children was not ignored in fixing the amount which he could appropriately be called upon to pay for the wife's support.[17] Actually, however, the order for permanent alimony involved more than a mere judicial measurement of the husband's legal duty as husband to support the wife. If he acquired wealth from the wife by virtue of the marriage, he could not be compelled to disgorge, but that fact was of influence in fixing the amount of the award.[18] Finally, in the minds of some of the judges at least, the notion of punishment depending upon the degree of the husband's moral delinquency played some part in the process.[19] By balancing the above considerations the wife might be allotted as much as one-half of the combined income of the spouses, and often as much as one-third.[20]

While apparently there is no reported precedent in the Ecclesiastical courts on the matter,[21] it has been assumed that permanent alimony to the guilty wife against whom the husband secured a separation was judicially unthinkable.[22] This unenlightened view, totally blind to the fact that a guilty wife may starve as quickly as an innocent one, found technical justification in the theory that the husband's duty to support continued only so long as she cohabited with him or lived apart because of his misconduct. In this respect Parliamentary precedent is significant. As the legislative divorce grew in popularity, it became common practice for Parliament to insist

[14] The wife was said to be entitled to a "comfortable subsistence in proportion to her husband's income," Kempe v. Kempe, *supra* note 12, at 533, 162 Eng. Repr. 668, 669, and "consistent with her station in society." Durant v. Durant, 1 Hag. Ecc. 528, 531, 162 Eng. Repr. 667, 668 (1826). If the wife was secured in a separate income, the joint income of the spouses was invariably made the basis for computing the amount of permanent alimony.

[15] Cooke v. Cooke, *supra* note 12; Otway v. Otway, *supra* note 10; Kempe v. Kempe, *supra* note 12.

[16] An indirect control over the custody of children was exercised, however, by so fixing the amount of permanent alimony as to encourage a penurious husband to give custody to the wife. In Smith v. Smith, 2 Phill. Ecc. 235, 161 Eng. Repr. 1130 (1814), deduction for the support of a child which the husband had forcibly taken from the wife was refused. In Kempe v. Kempe, *supra* note 12, the court indicated to the husband that if the wife refused to take custody of the child, the court would be inclined to reduce the amount of alimony, but not if he refused to give custody to the wife.

[17] Otway v. Otway, *supra* note 10; Blaquiere v. Blaquiere, 3 Phill. Ecc. 258, 161 Eng. Repr. 1319 (1820); Durant v. Durant, 1 Hag. Ecc. 528, 162 Eng. Repr. 667 (1826).

[18] Cooke v. Cooke, *supra* note 12; Smith v. Smith, *supra* note 16: ". . . perhaps it would be but just that where the husband violates the matrimonial engagement, and the fortune was originally belonging to the wife, that he should give back the whole of it—Courts, however, have not gone that length. . . ."

[19] ". . . it is due to the morals of society that a dissolute husband, who so offends (adultery with servant girl) should contribute liberally to the support of an injured wife." Kempe v. Kempe, *supra* note 12. See also Cooke v. Cooke, *supra* note 12; Street v. Street, 2 Phill. Ecc. 1, 162 Eng. Repr. 196 (1814).

[20] Otway v. Otway, *supra* note 10 (one-half after deduction for support of children); Cooke v. Cooke, *supra* note 12 (one-half, the court discussing several unreported decisions); Smith v. Smith, *supra* note 16 (one-half); Street v. Street, *supra* note 19 (about two-fifths); Kempe v. Kempe, *supra* note 12 (one-third, wife having custody of one child); Durant v. Durant, *supra* note 17 (about one-sixth).

[21] See Gooden v. Gooden, 65 L. T. 542, 543 (1891).

[22] See, for instance, 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) §863; STEWARD, MARRIAGE AND DIVORCE (1887) §§362, 367; 3 BLACKSTONE, COMM. 94; GODOLPHIN, REPORTORIUM CANONICUM (3d ed. 1687) pp. 508, 509.

upon a pecuniary provision for the support of the guilty wife as a condition to granting the husband a divorce.[23] That was a novel and significant development in the law of divorce flying in the face of the then accepted legal and moral dogmas.[24] Alimony to the innocent husband seems never to have been suggested to the Ecclesiastical judges, but such an award would presumably have been also unthinkable because the wife was under no duty to maintain him.

Somewhat different considerations surrounded the problem of providing the wife with maintenance during the pendency of the proceedings, and with suit money. That an innocent wife must be placed in a position to obtain a separation or defend against the husband's false charges was readily apparent. Temporary alimony and suit money were accordingly ordered when reasonably necessary to enable her to prosecute or defend the divorce libel.[25] The Ecclesiastical judges, however, did not lose sight of the fact that the marital delinquency of the husband was yet to be determined and of the danger that he be required to support a guilty wife or to provide her with funds with which to maintain a vexatious suit. If the wife had ample financial means, the allowance might be withheld.[26] On the other hand, if the complaining husband was unable to furnish maintenance[27] or failed to comply with the court's order,[28] his action might be stayed. In any event it was said that the allowance should be smaller than permanent alimony.[29] The nature of the accusation made apparently assumed considerable importance.[30] As in the case of permanent

[23] MACQUEEN, *op. cit. supra* note 3, at 537 *ff.*

[24] "The Parliamentary practice of requiring the injured husband to make a provision for his delinquent wife had not much to commend it, either morally or legally. Morally it seems monstrous to compel a man to support through life the woman who has dishonored him; legally, she has no claim whatever, because after she has committed adultery, the husband may turn her out of doors. . . . What, therefore, can appear more strange than to call upon the husband to secure her maintenance? Yet this was constantly done in Parliament, sometimes in the upper but often in the lower assembly." MACQUEEN, DIVORCE AND MATRIMONIAL JURISDICTION (1858) 55.

[25] See references, *supra* note 9. The fact that the common law scheme of marital property rights left the wife economically helpless was emphasized. Wilson v. Wilson, 2 Hag. Cons. 203, 161 Eng. Repr. 716 (1797). Before temporary alimony was ordered, the marriage must have been admitted or proved. Smyth v. Smyth, 2 Add. 255, 162 Eng. Repr. 287 (1924); Mitchell v. Mitchell, 1 Sp. Ecc. 102, 164 Eng. Repr. 59 (1853). Usually, the temporary alimony was computed from the date of the return of the citation. Bain v. Bain, 2 Add. 286, 162 Eng. Repr. 286 (1824). An allowance to the wife might be made pending appeal from a sentence against her. Lovedon v. Lovedon, 1 Phill. Ecc. 208, 161 Eng. Repr. 962 (1810). Following the ecclesiastical practice, Parliament frequently required the husband seeking a legislative divorce to provide the wife with funds to maintain her defense. MACQUEEN, *op. cit. supra* note 3, 531 *ff.*

[26] Wilson v. Wilson, *supra* note 25. See also the unreported decisions referred to in Beevor v. Beevor, 3 Phill. Ecc. 261, 161 Eng. Repr. 1319 (1809).

[27] In Bruere v. Bruere, 1 Curt. Ecc. 566, 163 Eng. Repr. 198 (1837), temporary alimony was not granted because the complaining husband was an insolvent debtor, but the proceedings were stayed "until some small sum by way of maintenance is afforded to the wife."

[28] Bird v. Bird, 1 Lee 572, 161 Eng. Repr. 210 (1754) (nullity suit).

[29] Otway v. Otway, *supra* note 10; Smith v. Smith, 2 Phill. Ecc. 152, 161 Eng. Repr. 1105 (1813); Kempe v. Kempe, *supra* note 10.

[30] The application of a wife charged with adultery was not looked upon with complete tolerance. "Now, though the wife during the pendency of the suit must be presumed not to be guilty, yet she is not to live exactly in the same way as if she were exempt from any imputation: She is as it were under a cloud, and should seek privacy and retirement." Hawkes v. Hawkes, 1 Hag. Ecc. 526, 162 Eng. Repr. 666, 667 (1828) (suggesting also that the courts "have in such cases been generally disposed to consider as a fair medium about one-fifth of the net income"). On the other hand, a charge of adultery made by

alimony, the fact that the husband's wealth came from the wife,[31] or that there were children to support,[32] was of influence in determining the amount of the allowance. The issue as to temporary alimony was raised by an ancillary pleading called "allegation of faculties," in which the necessary averments of the wife's needs and the husband's means were made, which the husband was required to answer under oath.[33]

Under the Ecclesiastical law the wife was not entitled to permanent alimony after divorce *a vinculo*.[34] The marital relationship upon which her right to support depended was declared never to have legally existed. She was then in the same position as any other *feme sole* to maintain herself. The more enlightened legislation today[35] reflects the recognition that the practical effects of reliance upon the fact of marriage cannot be so easily ignored. The *de facto* wife, however, was given temporary alimony and suit money when defending a nullity action brought by the husband.[36]

The alimony order being designed primarily for maintenance and based upon a continuing duty to support, the Ecclesiastical judges felt free to modify the order as changed circumstances might warrant.[37] The traditional method of enforcing the order was by the process of excommunication.[38] The common law writ *de estoveriis habendis* was apparently also available.[39] In an appropriate case, the Chancellor might assist by the issuance of the writ *ne exeat Regno*.[40] When Parliament later forbade the use of excommunication for civil purposes, enforcement by contempt and sequestration with the cooperation of the High Court of Chancery was substituted.[41]

ALIMONY UNDER AMERICAN STATUTES

Every American jurisdiction[42] except South Carolina has a statute regulating the allowance of alimony to the wife in absolute divorce. In two states (Delaware,[43]

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the wife was said to "give a complexion to the case." Rees v. Rees, 3 Phill. Ecc. 387, 389, 161 Eng. Repr. 1361, 1362 (1821) (the court suggesting a different approach where the wife sues on the ground of cruelty "which frequently turns out a complication of equivocal facts where there are faults on both sides").

[31] Smith v. Smith, *supra* note 29.

[32] Brisco v. Brisco, 2 Hag. Cons. 199, 161 Eng. Repr. 714 (1816); Hawkes v. Hawkes, *supra* note 30.

[33] 2 BURN, *op. cit. supra* note 4, at 508; POYNTER, *op. cit. supra* note 4, at 86; Brisco v. Brisco, 2 Hag. Cons. 199, 161 Eng. Repr. 714 (1816).

[34] AULIFFE, PARERGON (1726) 59; GODOLPHIN, *op. cit. supra* note 9, at 509; 2 BISHOP, *op. cit. supra* note 2, §885. In Bird v. Bird, 1 LEE 620, 161 Eng. Repr. 227 (1754) the one reported decision usually cited for the above proposition, the husband obtained a nullity decree based on the wife's former marriage of which fact she had knowledge at the time of contracting the second marriage.

[35] See 1 VERNIER, AMERICAN FAMILY LAWS (1931) §53.

[36] Bird v. Bird, 1 Lee 209, 418, 161 Eng. Repr. 78, 154 (1753). See also Portsmouth v. Portsmouth, 3 Add. 63, 162 Eng. Repr. 404 (1826); Mills v. Chilton, 1 Rob. Ecc. 688, 164 Eng. Repr. 1178 (1849).

[37] Cox v. Cox, 3 Add. 276, 162 Eng. Repr. 480 (1826) (temporary alimony in proceeding for restitution of conjugal rights reduced). See also De Blaquiere v. De Blaquiere, 3 Hag. Ecc. 322, 329, 162 Eng. Repr. 1173, 1175 (1830); Neil v. Neil, 4 Hag. Ecc. 273, 162 Eng. Repr. 1446 (1832); POYNTER, *op. cit. supra* note 4, at 89.

[38] 2 BURN, *op. cit. supra* note 4, at 506.

[39] 1 BLACKSTONE, COMM. 441.

[40] 3 DANIEL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY (2d ed. 1851) 1996.

[41] 53 GEO. III, c. 127 (1812-13); 2 & 3 WM. IV. c. 93 (1831-32).

[42] In this article American jurisdictions will include the forty-eight states, Alaska, District of Columbia and Hawaii. Absolute divorce is prohibited in South Carolina by S. C. CONST., Art. 17, §3.

[43] *Delaware:* REV. CODE (1935) §§3511, 3512. On divorce for the husband's aggression the wife shall be allowed a reasonable share of his real and personal property.

Texas[44]) the allowance is indirect and in the form of a division of property. In another (North Carolina[45]) the statute also authorizes a division of property but is fragmentary and obscure. In the remaining jurisdictions the following points will be considered: (1) whether permanent alimony is to be awarded before or after the final decree, or only in such decree; (2) whether the award is by the court or jury; (3) the statutory name or description of the award; (4) conditions of the award, such as guilt of the husband, need of the wife, etc.

Time of the allowance—Only three states[46] expressly provide for an award of alimony after the decree. In nearly all the others the language is such that it seems to refer to the time of the decree only.[47] Two[48] expressly time the alimony award with the interlocutory decree. Only one[49] specifies a time before or at the decree.

Who makes allowance—The allowance of alimony is by the court in all jurisdictions except one.[50]

Statutory description of the award—It is interesting to note that of the forty-seven jurisdictions providing for an allowance to the wife, only thirty-two expressly describe it as alimony and only two denominate it "permanent." In nine states two descriptive words are used; one uses three, another four. Among the terms are "maintenance" (eleven jurisdictions), "allowance" (ten jurisdictions), "support" (three jurisdictions), and "recovery," "payment," "separate support and maintenance," "sum of money" (one each).[51]

Conditions of the award—The Ecclesiastical courts did not grant alimony to a wife divorced for her own misconduct, nor to one who was not in need of aid. Most American jurisdictions preserve the Ecclesiastical rule as to the guilty wife either by failure to change it or by express provision. A few jurisdictions have statutes which expressly or by implication permit the guilty wife to have alimony.[52] Of course in those jurisdictions where the court may divide the property of the parties regardless of fault[53] or where a part of the husband's property may be decreed to the guilty wife[54] some provision may be made for a destitute though guilty wife.

Revision of alimony—Since alimony in absolute divorce is a substitute for the wife's right to support by her husband it would seem that it should be subject to change as the need of the wife or the ability of the husband changes. This seems to be the rule of the Ecclesiastical courts in limited divorce cases and of the courts of a

[44] *Texas:* COMPL. STAT. (1928) Civ. Code, art. 4638. The court shall order a division of the estate of the parties in such a way as seems just and right, having due regard to the rights of each party and the children.

[45] *North Carolina:* CODE (Michie, 1927) §1668.

[46] *Massachusetts:* GEN. LAWS (1932) c. 208, §34; *New Jersey:* COMP. STAT. (1910) p. 2035, §25; *Rhode Island:* GEN. LAWS (1923) §4216.

[47] The language of the statute varies, but the following phrases are common: "Upon granting a divorce," "when a marriage shall be dissolved," "when a decree shall be entered," "where divorce is granted," "in the final decree," "on final hearing," etc. See 2 VERNIER, AMERICAN FAMILY LAWS §105, Table LIII.

[48] *Utah:* REV. STAT. (1933), 40-3-1, 40-3-5; *Washington:* COMP. STAT. (Remington, 1922) §988.

[49] *New York:* CIV. PRAC. ACT (Cahill, 1931) §§1155, 1170, 1175.

[50] *Georgia:* COLE (1933) §30-209.

[51] 2 VERNIER, AMERICAN FAMILY LAWS §105, Table LIII.

[52] *Id.* §105. [53] *Id.* §96. [54] *Id.* §§99, 100.

few American jurisdictions in absolute divorce. But the prevailing rule is that the court can not alter the decree after it has been made, unless power to do so was reserved therein, or unless there is statutory authority. In 1886 Stimson found statutes giving such authority in only twenty states.[55] Today there are statutes authorizing revision in thirty-four.[56] In nearly all of these revision is within the discretion of the court. Seven states,[57] however, make revision mandatory in case of the wife's remarriage. Four of these have been passed in the last five years. In the states where statutes make revision of alimony discretionary with the court, specific circumstances are rarely mentioned.[58]

Form and amount of alimony—Of the fifty American jurisdictions awarding absolute divorce all but Texas have some express provision relating to the form and amount of alimony. In practically all of these the amount of alimony is left to the discretion of the court. In Georgia,[59] however, the amount of alimony is fixed by the jury. Only two states[60] fix an upper limit for the award.

In the other states the statutes restrict the discretion of the courts in two ways; by the use of rather vague defining terms or by directing the court to consider certain more or less specific considerations. The most frequently occurring defining term is "just" found in twenty-two jurisdictions. "Reasonable" occurs seventeen times; "suitable," eight; "proper," six; "equitable" five. Other words found in various statutes are: "fit," "necessary," "sufficient," "right" and "expedient."

Fourteen jurisdictions do not name any definite considerations by which the court is to be governed in fixing the amount. This is probably the best type of statute. The vague considerations named in many statutes are at best useless. They are even possibly dangerous in that they may be treated as narrowing the scope of the court's discretion by implication. The only matters mentioned with any frequency are the circumstances or situation of the parties (found in twenty jurisdictions). Other considerations mentioned are: all the circumstances of the case (eight jurisdictions), nature of the case (seven), ability of the husband (eight), character of the parties (five), the value of the husband's estate (four) etc. etc.[61]

[55] STIMSON, AMERICAN STATUTE LAW (1886) §6261.

[56] 2 VERNIER, AMERICAN FAMILY LAWS §106; *id.* (1938 Supp.) §§105, 106.

[57] *California:* CIV. CODE (Lake, 1937) §139; *Hawaii:* Laws 1933, Spec. Sess., act 35, p. 48; *Illinois:* REV. STAT. (Cahill, 1931) c. 40, §19, am'd by Laws 1933, p. 492; *Montana:* REV. CODE (1935) §5771; *New Jersey:* Laws 1933, c. 145, p. 296; *New York:* CIV. PRAC. ACT (Cahill, 1931) §1159; *Wisconsin:* STAT. (1935) §247.38.

[58] Four states mention remarriage of the wife and one (New York) mentions financial inability of the husband. For reference to these statutes and for details of all revision statutes, see 2 VERNIER, AMERICAN FAMILY LAWS §106, Table LIV; *id.* (1938 Supp.) §106. For cases on the effect of second marriage upon the obligation to pay alimony, see note, L. R. A. 1915F. 820-23.

[59] *Georgia:* CODE (1933) §30-209.

[60] In Louisiana, CIV. CODE, art. 160, am'd by Laws 1928, p. 24 alimony shall not exceed one-third of husband's income. In Minnesota, GEN. STAT. (1923) §8602, alimony must not exceed in aggregate with property awarded wife, in present value, one-third the personal estate and income and one-third the value of real estate of husband. In 1886 Rhode Island and Connecticut had similar restrictions. See STIMSON, AMERICAN STATUTE LAW §6262.

[61] For the exact words used in each statute, see 2 VERNIER, AMERICAN FAMILY LAWS §107, Table LV; *id.* (1938 Supp.) §107.

Most American statutes do not specify whether the alimony is to be paid in a gross sum or by stated instalments. Fifteen jurisdictions specifically provide that it may be by instalments, which is presumably the law also where the statute is not specific to the contrary. Fourteen jurisdictions[62] specifically provide that the alimony allowance may be in gross. In most of these it is provided, however, that the court may award alimony in instalments or that a decree of a gross sum may be satisfied on the instalment plan. None of the statutes seem to make mandatory the payment of a gross sum.

Enforcement and security—That many husbands object to paying alimony can be fairly deduced from the number and variety of statutes providing for methods of enforcing the court's decree. At first glance it is surprising to find that eight states[63] have no enforcement statutes expressly relating to divorce. Divorces, however, are usually granted by courts having equity powers and the usual remedies of the chancellor are generally available wherever divorces are granted. This discussion will be limited to statutes specifically relating to enforcement of divorce decrees. Forty-three states have such express statutes. They fall conveniently into three classes: those dealing with security for the husband's performance; those concerned with specific enforcement measures; and those conferring upon courts in divorce actions in express terms broad powers which most divorce courts probably have as courts of equity or law.

Security—Twenty-seven states[64] provide in varying terms that the husband may be required to give security to abide by the decree. These statutes show certain minor

[62] *Alaska:* Laws 1923, p. 38 (in gross or instalments); *Arizona:* REV. CODE (Struckmeyer, 1928) §2187 (in one sum, or in instalments); *Connecticut:* GEN. STAT. (1930) §5182 (at stated periods with a definite amount fixed which may be paid in lieu of all instalments); *Delaware:* REV. CODE (1935) §3512(16) (gross sum, or an annual allowance); *Indiana:* ANN. STAT. (Burns, 1926) §1111 (gross sum, not annual instalments, but court may give time for payment by instalments); *Kansas:* REV. STAT. (1923) §60(1511) (in gross or instalments); *Maine:* REV. STAT. (1930) c. 73, §9 (may be a specific sum to be paid wife, instead of alimony); *Michigan:* COMP. LAWS (1929) §12745 (to be paid in gross or otherwise); *Missouri:* REV. STAT. (1929) §1356 (may be in gross or from year to year); *New Mexico:* STAT. ANN. (1929) §68(506) (in single sum or in instalments); *Ohio:* COMPL. GEN. CODE (Page, 1931) §11991 (in gross or instalments as equitable); *Oklahoma:* STAT. (1931) §672 (in gross or instalments as is just and equitable); *Oregon:* CODE (1930) §6(914) (in gross or instalments); *Rhode Island:* GEN. LAWS (1923) §4216 (fixed sum or sums).

[63] Alabama, Delaware, Kansas, Louisiana, Nevada, South Carolina, Texas and Utah.

[64] *Arizona:* REV. CODE (Struckmeyer, 1929) (court may affix a lien on husband's property to secure payment); *California:* CIV. CODE (Lake, 1937) §140 (court may require husband or wife to give reasonable security); *Colorado:* COMP. LAWS (1921) §5599 (court may require security to be given); *Florida:* REV. GEN. STAT. (1920) §§3195, 3198, 3200 (court may order security to be given); *Hawaii:* REV. LAWS (1925) §2981 (judge may require reasonable security); *Idaho:* CODE (1932) §31-707 (court may require reasonable security); *Illinois:* REV. STAT. (Cahill, 1931) c. 40, §§19, 21 (reasonable security when wife is the complainant); *Indiana:* ANN. STAT. (Burns, 1926) §1111 (if court allows payment in instalments, it must require security); *Maine:* REV. STAT. (1930) c. 73, §9 (may order assignment to wife for life of part of husband's real estate, or rents and profits); *Massachusetts:* GEN. LAWS (1932) c. 208, §§12-14, 25, 36 (may order sufficient security when alimony is decreed to wife); *Michigan:* COMP. LAWS (1929) §12777 (party arrested for default in payment of alimony is to be discharged upon executing a bond with two sureties); *Minnesota:* GEN. STAT. (1923) §8604 (court may require husband to give sufficient security and may decree a specific lien upon specified parcels of his real estate); *Mississippi:* CODE (1930) §1421 (court may require sureties); *Missouri:* REV. STAT. (1929) §§1355, 1356 (husband may be ordered to give security); *Montana:* REV. CODE (1935) §5772 (may require husband to give reasonable security); *Ne-*

variations.[65] In seven states the general rule that security may be required only where the wife obtains the decree is set out; in one, security is to be asked only when payment is to be by instalments; in another, only after the arrest of the husband for non-payment. Whether security is to be by bond or otherwise is generally left to the court's discretion. Ohio[66] allows the court to withhold the decree of a successful husband until security is given.

Enforcement—There is a considerable variety in enforcement methods.[67] In six states resort to some or all of such remedies is conditioned upon failure to give the security ordered, or upon default of such security. The remedy provided may affect: (1) property of the defendant; (2) his person. Among the remedies provided by statute against property are: sequestration, receivers, attachment, execution, trustee process and garnishment. In Missouri[68] a spendthrift trust is invalid against an alimony decree.

While an alimony decree is in some respects a money judgment, it is also an order by a court of equitable powers, and as such is usually enforceable against the husband's person. Although the statutes of many states are broad enough to include contempt as a remedy by implication, it is curious to note that only ten[69] expressly mention contempt or imprisonment.

In the majority of states the enforcement statute is very general. It will be sufficient to give a few examples:[70] Any other remedy applicable to the case (California), such order or decree as will secure the wife's alimony to her (Florida), any compulsory process deemed proper (Maine), same manner as decrees in equity are enforced (Massachusetts), such other lawful ways and means as are according to practices of the court (Missouri), etc. Only nine[71] expressly provide for trustees who are to collect, receive, expend, manage or invest property or money ordered paid to or

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braska: COMP. STAT. (1929) §42(323) (court may require sufficient security); *New Hampshire:* PUB. LAWS (1926) c. 287, §78 (court may require security); *New Jersey:* COMP. STAT. (1910) p. 2035, §25 (court may require reasonable security); *New York:* CIV. PRAC. ACT (Cahill, 1931) §§1171, 1171a, 1172 (court may require reasonable security, in such manner and at such time as it thinks proper); *North Dakota:* COMP. LAWS (1913) §4406 (court may require reasonable security); *Ohio:* COMPL. GEN. CODE (Page, 1931) §§11979(1), 11995-6 (security, by bond or otherwise, to court's satisfaction); *South Dakota:* COMP. LAWS (1929) §166 (reasonable security); *Vermont:* GEN. LAWS (1933) §3159 (sufficient security); *Virginia:* CODE (1930) §5107 (court may require security); *West Virginia:* CODE (1931) c. 48, art. 2, §§13, 15 (may require security to abide any decree); *Wisconsin:* STAT. (1935) §247.30 (sufficient security); *Wyoming:* COMP. STAT. (1931) c. 35, §118 (court or judge may require security).

[65] See synopsis of provisions in note 23, *supra.*

[66] *Ohio:* COMPL. GEN. CODE (Page, 1931) §§11979(1), 11995.

[67] See details of enforcement statutes in 2 VERNIER, AMERICAN FAMILY LAWS §108, Table LVI and *id.* (1938 Supp.) §108.

[68] *Missouri:* REV. STAT. (1929) §569.

[69] *Colorado:* COMP. LAWS (1921) §5599; *Connecticut:* GEN. STAT. (1930) §5182; *District of Columbia:* CODE (1929) tit. 14, §§70, 71; *Iowa:* CODE (1935) §10482; *Michigan:* COMP. LAWS (1929) §§12779, 12780 (am'd Laws 1931, no. 232, p. 406); *Minnesota:* GEN. STAT. (1923) §8604; *Nebraska:* COMP. STAT. (1929) §28(462) (applies to alimony for support of children); *New York:* CIV. PRAC. ACT (Cahill, 1931) §1172; *Vermont:* GEN. STAT. (1933) §3172; *Wyoming:* COMP. STAT. (1931) §35 (120).

[70] For citations to and comparative wording of the statutes in all states, see 2 VERNIER, AMERICAN FAMILY LAWS §108, Table LVI; and *id.* (1938 Supp.) §108.

[71] See 2 VERNIER, AMERICAN FAMILY LAWS §108. The jurisdictions are: Alaska, Michigan, Minnesota, Nebraska, New Hampshire, Oregon, Vermont, Wisconsin, Wyoming.

for the wife, and to pay the income or principal thereof to the wife, under the court's discretion. Michigan seems to be the only state providing a special action[72] against a party ordered to pay alimony in another state. New York appears to be the only state making special provision[73] for the enforcement of the decree against a defendant in hiding or out of the state. Recent amendments in Michigan and New York evince a tendency to restrict the use of contempt.

Alimony to the husband—If an allowance may be ordered paid by a wife to a husband in a divorce case, it is nevertheless a misnomer to call it "alimony," for alimony is a substitute for the common law duty of support. A wife owes her husband no such duty, except by statute in a few jurisdictions. It follows that a court may not grant alimony to the husband without statutory authority and such is the usual American rule. In 1886 Stimson[74] found two states which had statutes allowing alimony to the husband and three others which did not distinguish between the spouses in this regard. Today the statutes in fifteen jurisdictions authorize the granting of alimony to the husband and this does not include limited divorce statutes or statutes allowing the court to award part of the wife's property to the husband, unless the statutes expressly denominate such an award as alimony.[75]

Unsuccessful attempts have been made to persuade the courts to award alimony to husbands, based upon the theory that the married women's property acts, and other "equal rights" laws, have so equalized the property rights of the spouses as also to equalize their respective duties, including the duty of support. The answer of the courts has usually been that, in spite of such statutes the duty of support is still upon the husband alone, unless expressly imposed also upon the wife by statute, in which case, in a few instances, the husband has succeeded.[76]

Statutes which allow alimony, or something more strictly analogous to it than property awards are found in fifteen jurisdictions[77] today. Most of these statutes do

[72] *Michigan:* COMP. LAWS (1929) §12770.

[73] *New York:* CIV. PRAC. ACT (Cahill, 1931) §1171(a). It is provided that where the defendant is out of the state or is in hiding, so that he can not be served, the court may order sequestration of his property, real or personal, tangible or intangible, within the state; appoint a receiver thereof, who may be the wife; or take possession by injunction or otherwise. The property or its income may be applied to alimony, temporary or permanent, suit money, etc.; and if it be insufficient, the mortgage or sale of real property may be ordered. The wife may be authorized to use and occupy and house, property or chattels of the husband.

[74] STIMSON, AMERICAN STATUTE LAW (1886) §6264.

[75] See note 77, *infra,* for statutes of the fifteen states granting alimony to husbands. The effect of divorce on property rights is not within the scope of this article. For a collection and analysis of such statutes see 2 VERNIER, AMERICAN FAMILY LAWS §§96-102; and *id.* (1938 Supp.) §§96-102.

[76] See annotations *Right of Husband to Alimony in Action for Divorce,* 19 ANN. CAS. 1142 (1911); and *Right of Husband to Alimony, Maintenance, Suit Money or Attorney Fees in Suit for Divorce,* 24 A. L. R. 491-99 (1923). See also comment in note (1923) 32 YALE L. J. 478, 483.

[77] *Alaska:* COMP. LAWS (1933) §3995—Whenever a marriage shall be dissolved, the court has power to further decree for the recovery of the party in fault, and not allowed the care of the children, such an amount of money, in gross or instalments as may be just and proper for such party to contribute to the maintenance of the other. *California:* CIV. CODE (Lake, 1937) §137—Temporary alimony allowed husband. *Illinois:* REV. STAT. (Cahill, 1931) c. 40, §19 as am'd by Laws 1933, p. 492—The court may make such order touching alimony and maintenance of the husband as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. *Id.* §16, as am'd by Laws 1935, p. 733—Suit money and temporary alimony are allowed the husband. *Iowa:* CODE (1935) §10478—The court may order either party to pay the clerk a sum of money for the separate support, maintenance and suit money

not call the allowance alimony. Many of them are halfway measures, being limited to temporary alimony, suit money, or in one instance to divorce for insanity.[78]

Temporary alimony and suit money—Temporary alimony, which is an allowance for the support of the wife by the husband (or, in a few states, of one spouse by the other) during the divorce litigation, differs from permanent alimony in that temporary alimony is an actual enforcement of a duty of support which exists because the marriage continues, while permanent alimony is awarded only when the marriage is dissolved and is a substitute for a duty of support which ended with the divorce. It would seem to follow that statutory authority is not required for a decree of temporary alimony. The question is not important, however, because all American jurisdictions granting divorce, except one,[79] have statutes authorizing a decree for alimony or suit money, or both, *pendente lite*.

Temporary alimony (for support) and suit money (for expenses of litigation) were regularly granted by the Ecclesiastical courts under rules substantially followed in most American jurisdictions today. The award could be made to a wife who was defendant as well as to one who was plaintiff, but in the latter case she had to show that there was a marriage, and in either case that she was really in need, and that there were probable grounds for her success in the action, the theory being that she could not, if guilty of a matrimonial offense, require her husband to support her. The claim could be defeated by the husband by showing that the court had no jurisdiction of his person, that the wife was guilty of cause for divorce, that she was not in need, that he was unable to pay, etc. The making of the award, and its amount,

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of the other. *Massachusetts:* GEN. LAWS (1932) c. 208, §34—Upon a divorce, or upon petition at any time thereafter, the superior court may decree a part of the wife's estate, in the nature of alimony, to the husband. *New Hampshire:* PUB. LAWS (1926) c. 287, §19—Upon a decree of divorce the court may order that the husband shall have a part of the estate of the wife, in the nature of alimony, as justice may require. *North Dakota:* COMP. LAWS (1913) §§4402, 4403, 4405—Either party may be required to pay temporary alimony to the other; the court, when the divorce is granted may compel either party to make allowance to the other for support. *Ohio:* COMPL. GEN. CODE (Page, 1931) §§11993, 11994—On divorce for the wife's aggression, the husband shall be allowed alimony out of her estate; temporary alimony may be awarded to either party. *Oklahoma:* STAT. (1931) §670—Suit money may be awarded to either party pending suit, and to the husband specifically, upon divorce. *Oregon:* CODE (1930) §6-914—Temporary support, pending appeal, may be awarded to the party found not to be in fault; whenever a marriage is dissolved, the court may provide for the recovery from the party in fault of an amount of money for the maintenance of the other. *Pennsylvania:* Laws 1929, act 430, §45—If the wife is petitioner and has sufficient means, the court or judge may provide for support of the insane husband, if the husband has not sufficient estate in his own right for his support. *Utah:* REV. STAT. (1933) §§40-3-3, 40-3-5—Temporary alimony may be awarded to either party, when an interlocutory decree is made, the court may make orders in relation to the maintenance "of the parties." *Vermont:* PUB. LAWS (1933) §3142—Perhaps suit money may be awarded to the husband, the section reading, "Such order (on application of either party) in regard to temporary alimony and funds to support the wife and minor children, and maintain the litigation during the pendency of the libel, as is just." *Virginia:* CODE (Michie, 1930) §5111—Upon divorce the court may make further decree concerning the maintenance of parties, or either of them. *Washington:* COMP. STAT. (Remington, 1922) §988—This section, though general in its terms, has been held not to justify an award of temporary alimony to the husband, State *ex rel.* Jacobsen v. Superior Court, 120 Wash. 359, 207 Pac. 227 (1922). *West Virginia:* CODE (1931) c. 48, art. 2, §15—Upon decreeing a divorce, the court may make further decree, as is expedient, concerning the maintenance of the parties or either of them.

[78] See Pennsylvania statute in note 77, *supra*.

[79] Tennessee, which has no statute, nevertheless awards both temporary alimony and suit money. See Lishey v. Lishey, 2 Tenn. Ch. 1 (1873); Winslow v. Winslow, 133 Tenn. 633; 182 S. W. 241 (1916).

were in the discretion of the ordinary. Of course, a hearing on these matters is merely preliminary, and the wife need establish only a *prima facie* case, the very purpose of the application being to enable her to go to the trial upon the merits. The courts, as we would expect, are more inclined to grant temporary alimony than permanent, but do not show as great a liberality in fixing the amount.

The statutes generally confer power to make allowances for alimony and suit money *pendente lite* in rather broad terms, which do not materially affect the operation of the foregoing rules. Hence the further discussion of these statutes will be confined to a statement of general tendencies and certain interesting exceptions.[80]

The application for temporary alimony should, in theory, be made before the final decree is obtained, since the order enforces the duty of support and depends on the existence of the marriage. Probably none of the statutes change this rule, the language used being general, *e.g.,* that application is to be made "pending suit," "during pendency of the action," "pendente lite," etc. The making of the award is discretionary in all jurisdictions, although a few statutes use words in single sections which seem to be mandatory, such as that the court "shall grant" etc. But even in these jurisdictions the statutes as a whole make it clear that the entire matter is discretionary, not merely as to the amount, but also as to making any award at all. Only a wife is entitled to temporary alimony and suit money. There is a recent tendency in a few states[81] to authorize such allowances to the husband.

Suit money includes only the actual expenses of trial and counsel fees. This being so, we should expect to find that the statutes make it the court's duty merely to ascertain the amount of such expenses, and to determine the fact of the wife's necessity. Such is in fact the case. Of course, a proper preliminary showing must be made by the wife, just as when she asks for alimony *pendente lite.* In only three states is the allowance called suit money. The nature of the allowance is made clear by the designation of its purpose.

The states which authorize an award of temporary alimony to the husband, also allow him suit money. Provisions for the enforcement of permanent alimony decrees have already been discussed. These provisions are worded so generally that they usually apply to awards of temporary alimony and suit money also. However most of the statutes authorizing temporary alimony and suit money have special sections relating to enforcement.

Transfers of property in fraud of alimony—Alimony must come from one of two sources—the property or the income of the husband. Recalcitrant husbands sometimes attempt to dispose of or encumber their property and thus defeat the allowance of alimony. To prevent this many states have passed statutes. These statutes take two forms: provisions for injunctions against disposing of property, and provisions rendering such disposition void as against claims for alimony. Statutes expressly authorizing injunctive relief have been found in seventeen jurisdictions. Conveyances

[80] For a detailed comparison of the statutes, see 2 VERNIER, AMERICAN FAMILY LAWS §110, Table LVII; and *id.* (1938 Supp.) §110.

[81] See note 77, *supra.*

in fraud of alimony are expressly voided by the statutes of five states. These, with certain other statutes designed to facilitate control of property, so that it may be available to meet the alimony decree are summarized in a note below.[82]

[82] *Alaska:* COMP. LAWS (1933) §3994—Court may enjoin disposition of property of either party pending suit. *Arizona:* REV. CODE (1928) §§2185, 2186—After the action has been brought, the husband shall not dispose of the community property, and any alienation made by him after that time shall be null and void, if made with a fraudulent intent of injuring the rights of the wife. At any time during the action the wife may require an inventory of all community property, and of her separate property, and may obtain an injunction against the husband's disposing of any of it. The court may make such temporary orders, during the pendency of the action, respecting the property of the parties, as may be necessary. *District of Columbia:* CODE (1929) tit. 14, §70—The court may enjoin any disposition of the husband's property made to avoid the collection of allowances of temporary alimony and suit money, and of permanent alimony. *Florida:* REV. GEN. STAT. (1920) §3198—If the husband is about to remove himself or his property from the state, the court may award a ne exeat or injunction against him or his property. *Georgia:* CODE (1933) §30-112—After separation, no transfer of property made by the husband, except bona fide, in payment of existing debts, shall pass the title so as to avoid the vesting thereof according to the final verdict of the jury. *Kansas:* REV. STAT. (1923) §60(1507)—After a petition has been filed, the court may make such orders to restrain the disposition of the property of the parties, or either of them, as may be proper. The probate judge may so order in case of the absence or disqualification of the district judge, and may modify his own orders in this respect, but not those of the district judge. *Kentucky:* STAT. (Carroll, 1922) §§2124, 2126—When the husband is about to remove himself or his property out of the state, or there is reason to suspect that he will fraudulently sell, convey or conceal his property, the wife may obtain orders to secure alimony for herself and maintenance for her children without giving surety. Sales and conveyances to a purchaser with notice, or for the benefit of any religious society, in fraud or hindrance of the right of wife or child to maintenance shall be void as against them. *Louisiana:* CIV. CODE, arts. 149, 150, 151—During the suit for separation the wife may, for the preservation of her rights, require an inventory and appraisement to be made of the movables and immovables in her husband's possession, and an injunction restraining his disposing of any part thereof, in any manner. From the day on which the action is brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him after that time shall be null, if it be proved to be made with the fraudulent view of injuring the right of the wife. The rule is the same in divorce actions. *Massachusetts:* GEN. LAWS (1932) c. 208, §§12-14—The husband's property may be attached pending suit. *Nevada:* COMP. LAWS (1929) §9463—If after the filing of the petition, it seems probable to the court or judge in vacation that either party is about to do any act that would defeat or render less effective any order the court might ultimately make concerning property or pecuniary interests, an order shall be made for the prevention thereof, to be enforced as preliminary orders are enforced respecting children. *New Hampshire:* PUB. LAWS (1926) c. 317, §15—Libelee's property may be attached pending suit. *New Mexico:* STAT. ANN. (1929) §68(506)—The court may restrain the use or disposition of the property of either party, and enforce its order by attachment or otherwise. *North Carolina:* CODE (1927) §1666—If the husband is about to remove or dispose of his property, for the purpose of defeating the wife's claim for alimony, notice to him of the wife's claim of temporary alimony is not required. *Ohio:* COMPL. GEN. CODE (Page, 1931) §11996—When it appears to court or judge in vacation that a party is about to dispose of or encumber property, so as to defeat the other in obtaining alimony, an injunction may be allowed to prevent this with or without bond. *Oklahoma:* STAT. (1931) §670—After petition has been filed, the court or judge thereof in vacation may make and enforce by attachment orders to restrain the disposition of the property of the parties, and for the use, management, and control thereof. *Texas:* COMPL. STAT. (1928) arts. 4634, 4635, 6840—On and after the day on which suit is brought, it is unlawful for the husband to contract debts on account of the community, or to dispose of community lands; any alienation made by him thereafter is null and void, if it be proved to be made with a fraudulent view of injuring the wife's rights. At any time during the suit the wife, to preserve her rights, may require an inventory and appraisement of both real and personal estate in the husband's possession, and an injunction against his disposing of any of it in any manner. Sequestration may issue at any time before final judgment, when the wife who is suing makes oath that she fears her husband will waste her separate property, or the common property, or the fruits of either, or that he will sell or dispose of same so as to defraud her of her rights, or remove same from the county during suit. *Vermont:* PUB. LAWS (1933) §3143—The libelee, upon the application of either party, in any proceeding under the divorce chapter, may be enjoined from conveying, concealing or interfering with the property of the libelant, or from interfering with the possession, etc. of property held by either and claimed by the other. The court may make mandatory orders in connection with the property of the

Alimony in limited divorce—Limited divorce, more commonly known as divorce from bed and board or divorce *a mensa et thoro,* is the divorce of the English Ecclesiastical courts. Its primary effect was to destroy the right of cohabitation; its chief characteristic, that it did not destroy the marriage. Though often and justly criticized[83] the number of American jurisdictions granting limited divorce is on the increase. In 1886 Stimson[84] found only twenty jurisdictions which granted such divorce. Today there are twenty-six.[85] This does not include states authorizing separate maintenance decrees by statute.[86]

Express statutory authority is essential to the power to grant divorce from bed and board. It is probably true, however, that when a court is empowered to grant divorce from bed and board, the power to award alimony is included by implication. It should also be borne in mind that divorce statutes are so phrased and arranged as to make it fairly clear that ancillary provisions apply to both absolute and limited divorce. It is therefore not surprising to find that in many limited divorce jurisdictions, statutes specifically relating to alimony are either lacking or very sketchy. To get a complete picture one must look to the decisions and to the statutes relating to absolute divorce.

In all jurisdictions authorizing limited divorce an innocent wife may obtain alimony. In general the same rules and limitations apply as in case of absolute divorce. In only five states is the award of alimony expressly limited to an innocent wife, or

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parties and the children, and may enjoin either party from conveying or removing from the state, pending the libel or motion, such part of his or her property, as the judge considers necessary to secure alimony to be decreed, or make orders concerning the rights of either party, or any order that may be made pending such libel. *Virginia:* CODE (1930) §5107—Court, pending suit, may make any orders proper to preserve the estate of the husband, so that it may be forthcoming to meet any decree made. *Washington:* COMP. STAT. (Remington, 1922) §988—Court has power, at all times, to grant any and all restraining orders necessary to protect the parties and secure justice. *West Virginia:* CODE (1931) c. 48, art. 2, §13—The court or judge in vacation may make any proper order to preserve the estate of the husband, so that it may be forthcoming to meet any decree which may be made in the suit. *Wisconsin:* STAT. (1935) §247.23—The court may, pending the action, make necessary and proper orders in relation to the property of the parties. *Wyoming:* REV. STAT. (1931) §§35-119—If it appears, after filing petition, to the court or judge in vacation that either party is about to do an act which would defeat or render less effectual any order which the court might ultimately make in regard to property or pecuniary interests, an order shall be made for the prevention thereof, and such legal or equitable process issued as the court deems necessary or proper.

[83] See 2 VERNIER, AMERICAN FAMILY LAWS §114.

[84] STIMSON, AMERICAN STATUTE LAW (1886) §§6280, 6301, 6304 (1886).

[85] *Alabama:* CODE (1923) §7423; *Arizona:* REV. CODE (1928) §2189; *Arkansas:* DIG. STAT. (Crawford & Moses, 1921) §3500; *Delaware:* REV. CODE (1915) §3005; *District of Columbia:* CODE (1929) tit. 14, §63; *Georgia:* CODE (Michie, 1933) §§30-101; *Hawaii:* REV. LAWS (1925) §§2915, 2987; *Indiana:* ANN. STAT. (Burns, 1926) §1122; *Kentucky:* STAT. (Carroll, 1922) §2121; *Louisiana:* CIV. CODE, art. 138; *Maryland:* ANN. CODE (Bagby, 1924) art. 16, §39; *Michigan:* COMP. LAWS (1929) §12729; *Minnesota:* GEN. STAT. (1923) §8608; *Montana:* REV. CODE (1935) §5736; *Nebraska:* COMP. STAT. (1929) §42(302); *New Hampshire:* PUB. LAWS (1926) c. 287, §24; *New Jersey:* COMP. ST. (1910) p. 2028, §3; *New York:* CIV. PRAC. ACT (Cahill, 1931) §1161; *North Carolina:* CODE (1927) §1660; *North Dakota:* LAWS 1927, c. 132; *Pennsylvania:* LAWS 1929, act 430, §11; *Rhode Island:* GEN. LAWS (1923) §4129; *Tennessee:* CODE (1932) §8427; *Vermont:* PUB. LAWS (1933) §3130; *Virginia:* CODE (Michie, 1930) §5104; *Wisconsin:* STAT. (1935) §247.04.

[86] For the statutes of thirty-nine jurisdictions allowing separate maintenance decrees, see 2 VERNIER, AMERICAN FAMILY LAWS §139.

to a wife who is petitioner. Possibly, in the others the grant of alimony will be confined to an innocent wife in accordance with the Ecclesiastical practice.

A limited divorce will confer upon the husband no right to be supported by his wife which he did not have by virtue of the marriage. Therefore if he is to have alimony or something akin to it, statutory authority for the award is as necessary as it is in cases of absolute divorce. Seven states have statutes under which alimony might be awarded to a husband in a limited divorce action.[87]

Limited divorce statutes make no significant changes in the form and amount of alimony. It is probably safe to say that the same considerations govern in limited as in absolute divorce. In one case the decree enforces the husband's duty of support; in the other, it is a substitute for that duty. In two states[88] only is there a definite limit on the amount of alimony, and in both the limit is set at one third the annual net income of the party against whom the alimony is decreed.

Temporary alimony and suit money in limited divorce is governed by the same principles as govern such an award in absolute divorce. Only eleven[89] of the twenty-six limited divorce jurisdictions have statutes in reference to temporary alimony which apply specifically to limited divorce. Since none of them even purports to make any significant changes in the rules applied in absolute divorce cases further comment is unnecessary.

Schouler declares[90] that a statute applying to divorce means an absolute divorce and not one from bed and board. A perusal of the statutes themselves makes it clear that many such statutes were meant to apply to both types. Therefore the searcher should always, when seeking a statute dealing with a point in limited divorce, look to see if there is a statute applying to "divorce" which will cover limited divorce as well. Due to the paucity of applicable decisions and to lack of clarity in the statutes many points are left in doubt.

In conclusion—Two questions remain: (1) what changes have been made in the Ecclesiastical court rules by statutes relating to alimony; (2) do present-day statutes evince any tendency to change older statutory rules?

The most fundamental change made by statute in the Ecclesiastical court system of rules was to make alimony payable where the marriage is totally dissolved. This change was fundamental because alimony was an enforcement of the duty of support: yet it is now applied by statute after the relationship out of which the duty arises is totally dissolved. The second change in Ecclesiastical court rules is the

[87] *Indiana:* ANN. STAT. (Burns, 1926) §1124; *New Hampshire:* PUB. LAWS (1926) c. 287, §25; *North Carolina:* CODE (Michie, 1927) §1665; *North Dakota:* Laws (1927) c. 132, p. 167, §§2, 3, 4; *Rhode Island:* GEN. LAWS (1923) §4219; *Vermont:* PUB. LAWS (1933) §3131; *Virginia:* CODE (1930) §5111.

[88] *North Carolina:* CODE (Michie, 1927) §1665; *Pennsylvania:* Laws 1929, act 430, §45.

[89] *Alabama:* CODE (1923) §7424; *Arizona:* REV. CODE (1928) §2191; *Kentucky:* STAT. (Carroll, 1922) §2121; *Louisiana:* CIV. CODE, art. 148, as am'd by Laws 1928, p. 164; *Michigan:* COMP. LAWS (1929) §§12735, 12773; *Minnesota:* GEN. STAT. (1923) §§8593, 8612; *Nebraska:* COMP. STAT. (1929) §42(308); *New Hampshire:* PUB. LAWS (1926) c. 287, §25; *New York:* CIV. PRAC. ACT (Cahill, 1931) §1169; *North Carolina:* CODE (Michie, 1927) §1666; *North Dakota:* Laws 1927, c. 132, p. 167, §2.

[90] 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, (6th ed.) §545.

authorization of alimony either permanent or temporary to husbands. The third is the allowance of alimony to guilty wives. These last two changes are recent and not universally adopted, but both are to be commended. Other changes made by statute seem to be minor in character, such as allowance of alimony in gross and various changes in procedure.

Comparing today's statutes with earlier ones relating to alimony, at least three significant tendencies appear. The first two, *viz.*, authorizing alimony to the husband and allowance of alimony to guilty wives, have already been mentioned as they also represent fundamental changes in the Ecclesiastical court system of rules. The third significant change in present statutes over earlier ones relates to revision of alimony decrees. This change manifests itself in two ways: (1) courts are in general being given greater freedom to revise decrees; (2) in one situation, *viz.*, remarriage of the wife, the most recent statutes make revision or cessation of alimony mandatory. On the whole, the changes made by statute in the Ecclesiastical system and the changes made by late statutes over older statutes are to be commended.

THE EXERCISE OF JUDICIAL DISCRETION IN THE AWARD OF ALIMONY

EDWARD W. COOEY*

Judicial discretion is probably nowhere more intimately connected with human relations, nor is it given freer rein, than in the field of domestic relations. Particularly is this true when applied to the question of alimony. The nature of judicial discretion, however, is such that the limits of its exercise cannot be fixed by definition, and it is the aim of this paper not to define, but to attempt to examine, the factors that tend to guide the discretion vested in the courts to determine the amount of alimony payable upon divorce.

The material presented here is, in the main, the result of a study of over one hundred cases in which the exercise of judicial discretion as to alimony was subjected to appellate review. The cases were taken from the reports of the decisions of appellate courts throughout the country during the year preceding this study, supplemented by representative cases of earlier date. Appellate cases cannot, of course, give an accurate picture of the situation as it exists in the trial courts, the real arena for the judicial discretion discussed here. Unfortunately, however, the records of the trial courts are almost inaccessible for study, and this necessitates the present approach.

But information as to the workings of the trial court in this field is not wholly lacking. The Institute of Law of Johns Hopkins University has made intensive studies of the divorce court in action in Ohio and Maryland.[1] The Ohio study covered the period from July 1, 1930 to December 31, 1930; the Maryland study covers all cases filed during 1929 with disposition as of May 1, 1931. These studies do not indicate the factors operative in the exercise of judicial discretion with respect to alimony, but they do reveal the results of the process in the large.

The study conducted in Ohio[2] discloses that wives sought divorces and other "incidental relief"[3] in 4195 actions for divorce and were accorded such relief in 4438 cases; while the husbands sought "incidental relief" in only 649 actions, they

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[1] MARSHALL & MAY, THE DIVORCE COURT—MARYLAND (1932), THE DIVORCE COURT—OHIO (1933).

[2] MARSHALL & MAY, THE DIVORCE COURT—OHIO (1933) c. VI, "The Upshot of It All," pp. 320-342.

[3] In addition to alimony, this term may include custody of children, support money, property division, restoration of name, etc.

obtained it, nevertheless, in 747 cases. By table[4] it is shown that where wives sought permanent alimony in a total of 1883 actions, they obtained it in 1131. Of these 1883 actions, it was sought as the only incidental relief in 336 actions and obtained in 178; in 1547 actions, permanent alimony was sought in conjunction with other incidental relief, and here it was obtained in 953 cases.

Another table[5] shows that out of 6586 actions, there were 691 known gross payments,[6] and, of these, payments were awarded to the husband in 55 cases, to the wife in 635, and to both in only one. Out of 1516 known periodic payments weekly awards were made to the wife in 1049 and monthly awards in 430. Where property rights were adjusted, out of 1227 known adjustments, 138 went to the husband only, 790 to the wife only, and 299 to both. Out of the total of 6586 actions, 691 or 10.5% resulted in decrees of a lump sum of money.[7] In 91.9% of these cases, the award went to the wife. The median amount for these gross payments, for the state as a whole, was $386.

Out of the periodic payments[8] awarded in 1516 known actions, all but 37 were definitely payable to the wife. Of the remainder, 26 went to Juvenile Courts and 11 to third persons.[9] Over two-thirds were weekly payments, and less than one-third were monthly payments. The median of weekly payments for the state was $7.61, and the median of monthly payments was $30.

The authors point out that "the amount of the awarded periodic payment assumes its true significance only when stated in terms of the number of dependents involved. . . . In the 1458 cases in which the number of dependents and the size of the periodic payments were both known, the average award per action was $9.04, figured on a weekly basis, and this amounted to $3.42 per week per person affected. When the award was made for the wife alone, she receivd $11.66. But the larger the family, the less each person received. When there was a wife and one child, they secured $3.50 apiece; if two children, $3.37; if three children, $3.31; four children, $2.39; and five or more, $1.86."[10] Thus the wife seems to get a child's share when there are children involved.[11]

Out of 2058 women having been awarded the custody of minor children, 1534 or 74.5% received an award of money or property. Of these, 1338 were plaintiffs and 196 were defendants. Out of 4528 women who either had no minor children or were not awarded the custody of them, only 866 or 19.1% received alimony or property. The women with children "fared almost 4 times as well in obtaining money or

[4] MARSHALL & MAY, THE DIVORCE COURT—OHIO, Table VI, "Incidental Relief (other than counsel fees) Sought and Obtained in Divorce, Annulment, and Alimony Actions Granted in Ohio from July 1, 1930, to December 31, 1930," p. 323.

[5] *Id.* at 328.

[6] "In some instances these gross payments include counsel fees, in some they are in fact in lieu of alimony or support money, and in a few they are merely a lump sum award of alimony or support *pendente lite* in the payment of which the husband is in arrears." *Id.* at 331.

[7] *Id.* at 330 *et seq.*

[8] This includes alimony, support money, and both. It does not include gross awards payable in instalments.

[9] This type of payment it seems is almost exclusively awarded to the wife.

[10] MARSHALL & MAY, THE DIVORCE COURT—OHIO 337. See also, Chart VI at 339.

[11] For similar statistics as to Maryland, see MARSHALL & MAY, THE DIVORCE COURT—MARYLAND 314.

property awards as did women without children."[12] Hence although the wife's share decreases according to the number of children involved, she is more apt to receive an award because there are children involved. It is also pointed out that, in cases wherein children were concerned, the awards were much more likely to be continuing awards reaching into the future.

The Maryland study shows practically the same findings. The authors say, "It [alimony] is the only type of incidental relief which is obtained less frequently than it is sought in the petitions. Sought a total of 453 times, it was obtained but 218 times—well under one-half of the number of times sought. When asked for alone, it achieved little success indeed; out of 131 such requests, it was obtained but 23 times. . . . In general a request for alimony fared best when it was evidently connected in some way with the welfare of the children."[13]

As to property adjustments, the Ohio study indicates that out of 6586 granted actions, there were 1227 recorded instances of adjustment "without that adjustment being stated in financial terms."[14] This was nearly one-fifth of the granted actions. The husband was the beneficiary in about one-tenth of these cases; the wife, in about two-thirds; and in about one-fourth of the cases both husband and wife received awards of property. It is pointed out that the fact that the wives fare so well in property adjustments should not be surprising. "Wives file the bulk of the petitions, and most petitions are not answered; in such situations household property, for example, is quite likely to be awarded to the wife."[15]

Although these studies do not provide information on the point, it may be surmised that among persons of wealth settlement of the financial matters attendant upon divorce is more frequently effected out of court than by decree. Where the property at stake is large, reluctance to rely on judicial discretion in its disposition is to be expected if amicable adjustment is at all possible.

Before turning to the cases reviewing judicial discretion, it should be pointed out that the word "alimony" as it will be used hereafter may include not only the more or less common continuing periodic payments, but also awards of gross sums and awards of property. Since the purpose of the investigation is to bring to light the factors in the judicial process behind the award, this broad use of the word will tend to give a more comprehensive picture. Separate maintenance and support for children, since they give rise to special problems without the scope of this symposium, will be considered, if at all, only incidentally.

As to types, alimony can be allowed on a temporary or permanent basis. There are two kinds of permanent alimony: that rendered on a decree of divorce from bed and board *(a mensa et thoro)* and that rendered on a decree from the bonds of matrimony *(a vinculo matrimonii)*, but, since the cases seem to indicate that the factors involved in both categories are essentially the same, this distinction will not be

[12] MARSHALL & MAY, THE DIVORCE COURT—OHIO 340.
[13] MARSHALL & MAY, THE DIVORCE COURT—MARYLAND 311.
[14] MARSHALL & MAY, THE DIVORCE COURT—OHIO 327 *et seq.*
[15] *Id.* at 329.

observed in the treatment of permanent alimony. Since temporary alimony (alimony *pendente lite*) is not as significant as permanent alimony, it will be treated only generally.

Alimony has been described as, "an allowance which a husband, or former husband, may be forced to pay to his wife or former wife, who is living legally separated from him, for her maintenance,"[16] or "an incident of marriage based on the duty of the husband to support his wife. It signifies not a portion of his estate but an allowance adjudged against him for her sustenance according to his means and their condition in life during their separation . . . the controlling element is his compulsory contribution for her support and maintenance under obligations of the marriage contract."[17] And again, "that provision which the law makes for the support of the wife or of her who was the wife, out of the estate of the husband after separation, in lieu of his common law obligation to support her as wife if they should have continued living together."[18] Such definitions, however, mean very little unless they are considered in the light of a particular factual background.

Temporary alimony, as its name indicates, is only an *ad interim* provision for the support of the wife until the final determination of the divorce suit,[19] or an award to give the wife the means of defending[20] or prosecuting[21] the suit, or both. Some cases indicate that it is given as a matter of right,[22] while certain statutes place the question of an award in the discretion of the trial judge.[23] The determination of the amount is in the discretion of the trial judge,[24] and a wide latitude exists in the application of this discretion. Thus, where a wife was suing, it was held to be no abuse of discretion to award $4000 as alimony *pendente lite* where the husband was worth from $80,000 to $100,000 and had an annual income of from $8,000 to $10,000, though the court pointed out that the award was a large one for temporary alimony.[25] But in another case, in a suit by the husband, the court held that an award of $350 for temporary alimony accruing since marriage, and $25 a month pending the outcome of the suit, plus $300 for counsel fees, where the husband was without a profession, trade, or a business, owned no property and had tried to find work but failed, was "so grossly excessive as almost to shock the moral sense."[26]

The courts speak of the factors involved here in much the same language as they

[16] Bowen v. Bowen, 182 Okla. 114, 76 P. (2d) 900, 902 (1938).
[17] Ritzer v. Ritzer, 243 Mich. 406, 220 N. W. 812, 814 (1928).
[18] Muir v. Muir, 133 Ky. 125, 92 S. W. 314, 316 (1906).
[19] Duss v. Duss, 92 Fla. 1081, 111 So. 382 (1927).
[20] La Fitte v. La Fitte, 171 Ga. 404, 155 S. E. 521 (1930). See also Note (1854) 60 Am. Dec. 676.
[21] Snyder v. Snyder, 159 Md. 391, 150 Atl. 873 (1930).
[22] *Ex parte* Harris, 228 Ala. 88, 153 So. 449 (1934).
[23] See MD. CODE ANN. (1935 Supp.) art. 16, §16a: "In all cases where alimony or alimony *pendente lite* and counsel fees are claimed, the court shall not award such alimony or counsel fees unless it shall appear from the evidence that the wife's income is insufficient to care for her needs." See also GA. CODE (1933) §30-203.
[24] Bardin v. Bardin, 4 S. D. 305, 56, N. W. 1069 (1893); Stalings v. Stalings, 127 Ga. 464, 56 S. E. 469 (1907); Mulhall v. Mulhall, 120 Md. 22, 87 Atl. 490 (1913).
[25] Moore v. Moore, 130 N. C. 333, 41 S. E. 943 (1902).
[26] Culpepper v. Culpepper, 98 Ga. 304, 25 S. E. 443 (1896).

do when considering the problem of permanent alimony,[27] that is: financial condition of the parties, conduct, social status, age, health and others. The main emphasis, however, seems to be on the financial situation.[28] This seems logical since the award is only a temporary arrangement and is mainly directed to the necessities of the wife.

In the cases concerning permanent alimony, repeatedly there appears the statement that its amount rests largely in the discretion of the trial judge.[29] This is true even under statutes fixing the maximum amount which may be decreed.[30] The statutory provisions, however, are not considered in this paper.[31]

The vesting of discretionary power in the trial judge does not mean that his discretion is absolute or uncontrolled. If an appeal is taken from his ruling, the appellate court will review it in the light of the facts appearing in the record and determine whether the discretionary power has been abused, *i. e.*, whether its exercise appears to the appellate court to be arbitrary or unreasonable. Through their opinions reviewing discretionary action, the appellate courts have the opportunity not only to rectify injustices in the cases under review, but also to develop standards for future judicial action by stating the factors which should guide the trial judge in the exercise of his discretion.

What has in actuality motivated the trial judge will seldom be disclosed in the appellate opinion, nor, indeed, will the basis of the appellate court's action always be fully presented. What the opinion makes available is the set of factors and reasons which the court considered proper to employ in support of its decision. Rarely disclosed in the opinion will be the personal beliefs and biases of its author toward the marriage relation, divorce, and alimony itself, although it seems inevitable that such considerations must form the "inarticulate major premise" of many decisions in this field.

Among all the factors,[32] perhaps the most important is the financial condition of the parties. This is necessarily so since the primary end to be achieved is the support of the former wife.[33] It is logical, then, that where the wife's separate estate is sufficient to enable her to live in the manner to which she has been accustomed, no alimony will be allowed.[34] In at least two jurisdictions, however, it is held that the

[27] Heilbron v. Heilbron, 158 Pa. 297, 27 Atl. 967 (1893); Fountain v. Fountain, 80 Ark. 481, 97 S. W. 656 (1906); Day v. Day, 12 Idaho 556, 86 Pac. 531 (1906); Brandenburg v. Brandenburg, 246 Ky. 546, 55 S. W. (2d) 351 (1932).

[28] *Ex parte* Whithead, 179 Ala. 652, 60 S. 924 (1913).

[29] White v. White, 73 Cal. 105, 14 Pac. 393 (1887); Muir v. Muir, 133 Ky. 125, 92 S. W. 314 (1906); Deeds v. Deeds, 108 Kan. 770, 196 Pac. 1109 (1921); Fairbanks v. Fairbanks, 169 Md. 212, 181 Atl. 233 (1935); Rodgers v. Rodgers, 102 Colo. 94, 76 P. (2d) 1104 (1938).

[30] See MINN. STAT. (Mason, 1927) §8692; PA. STAT. (Purdon, 1930) tit. 23, §47.

[31] See Vernier, *The Historical Background of Alimony Law and Its Present Statutory Structure*, *supra* p. 201 *et seq.*

[32] For text treatments of these factors, see 2 SCHOULER, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (1921) §§1814-1827; 2 BISHOP, MARRIAGE AND DIVORCE (1873) §§374-383; 17 AMERICAN JURISPRUDENCE §§596-603; 10 HALSBURY'S LAWS OF ENGLAND (2d ed.) 784.

[33] "It is a well-settled principle that, in the absence of a special statute providing therefor, a husband is not entitled to permanent alimony in a suit for divorce." Note (1923) 24 A. L. R. 491.

[34] Thompson v. Thompson, 79 Mich. 124, 44 N. W. 424 (1898); Cottrell v. Cottrell, 24 Ky. L. Rep. 2417, 74 S. W. 227 (1903); Wilkins v. Wilkins, 84 Neb. 206, 120 N. W. 907 (1909). See also MD. CODE ANN. (1935 Supp.) art. §16a. cited *supra* note 23; KY. STAT. (Carroll, 1936) §2212; 19 C. J. 258.

wife's estate and capacity to earn is not to be considered.[35] Thus in one case under this minority rule, where it was shown that the wife owned a $300 lot and a half interest in an automobile worth $1000 and that she had an income of about $128 per month, the court said, "Ordinarily the wife's estate and capacity to earn money . . . are not to be considered."[36]

When the husband has an estate, and especially where lump-sum alimony is sought, the extent of that estate is the factor of primary interest.[37] In one case where the suit was by the wife, and alimony was denied in the lower court, the appellate court focused its attention on the husband's estate and found that it consisted of a farm for which he had refused $3100, four or five horses and other personal property, a one-third interest in his father's estate, subject to a life estate in his mother who was then seventy-five, and that the father's estate was worth about $4000. The court then held that the wife was entitled to alimony of $1000.[38]

In considering the estate of the husband, it is thought pertinent to inquire whether or not the wife helped in the accumulation of it.[39] It was held in one case that a wife divorced for the fault of the husband was entitled to alimony of $2250, where they had no children and the husband had about $5000, which the wife had helped him to earn;[40] but, in another, a wife who had not contributed to the estate was held only entitled to alimony of $5000 although her husband's estate was valued at about $75,000.[41]

Another legitimate factor to consider is the reasonable future expectancy of the husband.[42] Hence the court may take into account the husband's interest in his father's estate which will come to him on the death of his mother.[43]

Where the husband has no estate or where periodic payments are sought, the husband's income or earning capacity is accorded emphasis.[44] It was said in one case, "in determining the matter of alimony to be awarded, the court may take into consideration not only the husband's property and income, but also his capacity to earn money from personal attention to business. If it were otherwise a husband by de-

[35] Speery v. Speery, 80 W. Va. 142, 92 S. E. 574 (1917); Kittle v. Kittle, 86 W. Va. 46, 102 S. E. 799 (1920); Cralle v. Cralle, 84 Va. 198, 6 S. E. 12 (1887).

[36] Dayton v. Dayton, 109 W. Va. 759, 156 S. E. 105 (1930).

[37] Hall v. Hall, 25 Ky. L. Rep. 1304, 77 S. W. 668 (1903); Carter v. Carter, 140 Ky. 228, 130 S. W. 1102 (1910); Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381 (1910).

[38] Thompson v. Thompson, 27 Ky. L. Rep. 516, 85 S. W. 730 (1905).

[39] Zimmerman v. Zimmerman, 59 Neb. 80, 80 N. W. 643 (1899); Blair v. Blair, 40 Utah 306, 121 Pac. 19 (1912); Mason v. Mason, 233 S. W. 263 (Mo. App. 1921).

[40] Vey v. Vey, 150 Iowa 166, 129 N. W. 801 (1911).

[41] Miller v. Miller, 229 Ky. 436, 17 S. W. (2d) 412 (1929).

[42] Muir v. Muir, 133 Ky. 125, 92 S. W. 314 (1906); Anderson v. Anderson, 152 Ky. 773, 154 S. W. 1 (1913); Green v. Green, 152 Ky. 486, 153 S. W. 775 (1913); Plankers v. Plankers, 172 Minn. 464, 217 N. W. 488 (1928). See also Note (1906) 4 L. R. A. (N. S.) 909.

[43] Johnson v. Johnson, 36 Ill. App. 152 (1890). In Ramsey v. Ramsey, 125 Miss. 185, 87 So. 491 (1921), the husband had no property but the court awarded alimony in respect to his future earnings. *Contra:* Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 376 (1855): "Where there is no estate there can therefore be no alimony."

[44] *Ex parte* Spencer, 83 Cal. 460, 23 Pac. 395 (1890); Hedrick v. Hedrick 128 Ind. 522, 26 N. E. 768 (1891); Hooper v. Hooper, 102 Wis. 598, 78 N. W. 753 (1899); Reed v. Reed, 182 Okla. 149, 77 P. (2d) 30 (1938). See also Note (1920) 6 A. L. R. 195.

liberate intent or disinclination to work might defeat or avoid his marital obligation of support."[45] That the absence of a present capacity to support the wife is not controlling, is shown in another case where the Chancellor, commenting orally, said, "I think it is right that the sum allowed for alimony should be made so low that any healthy man, irrespective of a favorable engagement, should be able to earn it."[46] One court has refused, in determining the husband's income, to include in it returns from gambling.[47] Pensions, however, can be considered.[48]

What of the consideration of the indebtedness of the husband? Since the amount of alimony to be set should not weigh too heavily on the husband, it seems only logical that his debts should be a factor. This was pointed out in one case, the court saying, "The husband is not relieved of his duty to his wife by the fact that he owes debts, but his indebtedness must be considered in fixing the amount of alimony."[49]

Can the parties determine between themselves the amount of alimony? Two sorts of agreements are possible, ante nuptial and post nuptial. The main consideration in determining the validity of ante nuptial agreements seems to be whether or not they are fair to the wife, but any ante nuptial agreement which tends to induce or encourage separation or divorce is against public policy and hence void.[50] For example, an ante nuptial contract in which it is agreed not to ask for alimony or counsel fees in case of separation is invalid.[51] Post nuptial agreements may be either property settlements or attempts to regulate support. The court will tend to look closely for evidence of collusion,[52] and, if such is found or if the agreement is such as would tend to encourage dissolution of the marital bonds, it will be treated as void.[53] Agreements by the husband to provide for his wife in the event of such subsequent misconduct on his part as would justify a separation have been generally upheld,[54] and the right of the parties in a divorce suit to settle their property rights outside of court has been recognized, and this agreement if entirely fair will not be disturbed.[55]

Since alimony is essentially for the support of the wife, it seems illogical, in a way, that the idea of punishment should enter into the court's reasoning, and yet, the guilt of the divorced spouse becomes a factor tending to augment the award. This guilt

[45] Robins v. Robins, 106 N. J. Eq. 196, 150 Atl. 340, 341 (1930).

[46] Furth v. Furth, 39 Atl. 128, 129 (N. J. Eq. 1898).

[47] King v. King, 79 Neb. 852, 113 N. W. 538 (1907).

[48] Hedrick v. Hedrick, 128 Ind. 522, 26 N. E. 768 (1891); Tully v. Tully, 159 Mass. 91, 34 N. E. 79 (1893); Bailey v. Bailey, 76 Vt. 264, 56 Atl. 1014 (1903).

[49] Young v. Young, 323 Ill. 608, 154 N. E. 405, 408 (1926). Alimony is a debt of the husband preferred over his other debts only as to remedy and the fact that it is not discharged by bankruptcy. For a discussion of the rights of the wife's creditors to reach her alimony, see (1936) 4 DUKE BAR ASS'N J. 94.

[50] See Note (1931) 70 A. L. R. 826.

[51] Hilbert v. Hilbert, 168 Md. 364, 177 Atl. 914 (1935).

[52] See Note (1919) 2 A. L. R. 699.

[53] See Note (1913) 44 L. R. A. (N. S.) 379. For example, an agreement between husband and wife whereby he was to pay a certain sum to her and also to put notes in escrow to be delivered to her when she should have obtained a divorce was held to be void, Adams v. Adams, 25 Minn. 72 (1878).

[54] See Note (1910) 23 L. R. A. (N. S.) 880.

[55] Young v. Thompson, 220 Mo. App. 1266, 290 S. W. 85 (1927). For a discussion of the right of the wife to relief against a transfer made in fraud of her right to support, see Note (1909) 18 L. R. A. (N. S.) 1147.

is what the courts mean when they speak of the "conduct of the parties." Thus, in *Muir v. Muir*,[56] the court gave considerable weight to the fact that the husband had infected his wife with a venereal disease. In another case,[57] the parties were engaged in a small business to which the wife had contributed part of the original capital. The husband had infected the wife with a venereal disease, but the suit was, at his instance, based on the alleged misconduct of a step-daughter. On cross-complaint, the wife was awarded a divorce and alimony in the form of: a five-room house which rented for $18 per month, other property renting for $20 per month, two cars worth about $500, and the business and equipment itself. The husband was awarded property valued at about $750.

Where the wife is the guilty party and the husband obtains the divorce, permanent alimony will not as a general rule be awarded.[58] Thus it has been said that where a wife is divorced for her cruelty,[59] adultery,[60] or desertion,[61] she is not entitled to alimony. Where there is partial fault on both sides a sort of weighing process goes on. In one case where the husband voluntarily abandoned his wife, the fact that her "ill temper" and "mean disposition" drove him away from home was considered in setting the proper amount of alimony.[62] In another case, the court, granting the husband a divorce because of the "cruel and inhuman treatment" by the wife, "consisting of a long succession of relatively trivial incidents," held that an award of $1200 a month out of the husband's annual income of about $180,000 was not inadequate.[63]

In the cases examined, there seems little or no tendency to inquire into the circumstances leading to the marriage. An exception appears in the case of *Whithorn v. Whithorn*. The wife was suing the husband for divorce and alimony and the husband had filed a cross-petition. The trial court apparently arrived at the conclusion that the marriage was one of convenience only in this manner, "In sitting here yesterday and looking at the defendant in this case, if there is anything that would make one come to the conclusion that we have descended from monkeys, looking at this man would make you think of it. He had the appearance and countenance of a gorilla. I would hate to be led to the belief that the plaintiff in this case married this man loving him or because he was attractive."[64] The appellate court in commenting on this procedure indicated a certain sense of humor when it said, "It is extremely

[56] 133 Ky. 125, 92 S. W. 314 (1906). See also Gussman v. Gussman, 140 Ind. 433, 39 N. E. 918 (1895); Tuttle v. Tuttle, 26 S. D. 545, 128 N. W. 695 (1910); Smith v. Smith, 167 Ga. 98, 145 S. E. 63 (1928).

[57] Tway v. Tway, 280 N. W. 910 (Neb. 1938).

[58] Holman v. Holman, 155 Ky. 493, 159 S. W. 937 (1913); McKannay v. McKannay, 68 Cal. App. 701, 230 Pac. 214 (1924); Grush v. Grush, 90 Mont. 381, 3 P. (2d) 402 (1931); *In re* McKenna, 116 Cal. App. 232, 2 P. (2d) 429 (1931). See also Note (1933) 82 A. L. R. 539.

[59] McKannay v. McKannay, 68 Cal. App. 701, 230 Pac. 214 (1924).

[60] Beeler v. Beeler, 19 Ky. L. Rep. 1936, 44 S. W. 136 (1898); Hulette v. Hulette, 152 Miss. 476, 119 So. 581 (1928).

[61] Coffee v. Coffee, 145 Miss. 872, 111 So. 377 (1927); Grush v. Grush, 90 Mont. 381, 3 P. (2d) 402 (1931).

[62] Jones v. Jones, 95 Ala. 443, 11 So. 11 (1892).

[63] Cudahay v. Cudahay, 217 Wis. 355, 258 N. W. 168 (1935).

[64] 169 Okla. 374, 36 P. (2d) 943, 945 (1934).

unsafe to hazard a guess upon such appearance, since many marriages where wealth is not concerned would on the application of a similar assumption become impossible of explanation."[65]

In addition to these factors, the social status,[66] age and health,[67] and duration of the marriage[68] are almost invariably listed as factors to be considered, but the absence of discussion of these factors in the opinions precludes resort to illustration.

The desire for a more certain basis of decision than the factors heretofore enumerated, together with the judicial tendency to seek for an analogy, has led some courts and some statutes to recognize what may be called a "Rule of Dower." For example, the Pennsylvania statute reads, "In cases of divorce from bed and board, the court may allow the wife such alimony as her husband's circumstances will admit of but the same shall not exceed the third part of the annual profit or income of his estate or his occupation and labor."[69] In regard to the use of specific proportions in the cases, it has been pointed out that if the cases are examined, it will be found that what is considered a specific proportion is merely that amount which under the circumstances is reasonable.[70] That is probably true, but nevertheless some cases seem to recognize the rule. For example, the court in *Muir v. Muir,* says, "Where she is entitled to alimony, it would seem improper to give her less, in any event, than which her dower interest in her husband's estate would have been."[71] In another case it was stated, "It is also a general rule for the guidance of the trial court though not mandatory, that in awarding alimony to an innocent and injured wife, as part of a divorce decree, the wife should receive such sum as would leave her in as good condition as a surviving wife upon her husband's death."[72] And in still another case, the fact that the divorce cut off the wife's inchoate right of dower was said to be an element to be considered.[73] The New Jersey court said in one case, "No standard can be set up . . . but it is usually about one-third of the husband's income.[74] Yet in a later case, the same court said that, despite repeated urgings by the Bar that alimony for the support of the wife be set at one-third of the husband's income, such was not the rule in New Jersey.[75]

All too generally the appellate courts are content to discharge their function of affording guidance to the trial courts by the recital of formulae like the following. "In fixing the amount of permanent alimony, all evidence must be considered relating to the respective ages of the parties, duration of and conduct during marriage, the station in life, circumstances, and necessities of each, as well as their health and

[65] *Ibid.*

[66] Hooper v. Hooper, 102 Wis. 598, 78 N. W. 753 (1899); Young v. Young, 323 Ill. 608, 154 N. E. 405 (1926); Topor v. Topor, 287 Mass. 473, 192 N. E. 53 (1934).

[67] Roberts v. Roberts, 160 Md. 513, 154 Atl. 95 (1931); Tway v. Tway, 280 N. W. 910 (Neb. 1938); Fowler v. Fowler, 158 Ore. 586, 76 P. (2d) 1132 (1938).

[68] Zimmerman v. Zimmerman, 59 Neb. 80, 80 N. W. 643 (1899); Collins v. Collins, 182 Okla. 246, 77 P. (2d) 74 (1938).

[69] PA. STAT. (Purdon, 1930) tit. 23, §47. See also MINN. STAT. (Mason, 1927) §8602.

[70] Note (1913) 44 L. R. A. (N. S.) 998.

[71] 133 Ky. 125, 92 S. W. 314, 317 (1906).

[72] Dissette v. Dissette, 208 Ind. 567, 196 N. E. 684, 692 (1935).

[73] Born v. Born, 237 Mich. 323, 211 N. W. 657 (1927).

[74] Dietrick v. Dietrick, 88 N. J. Eq. 560, 102 Atl. 242, 243 (1918).

[75] Williams v. Williams, 12 N. J. Misc. 641, 174 Atl. 423 (1934).

physical condition."[76] Or, in a similar vein, "In determining the amount, regard should be had to a number of circumstances. Among these are the amount of the estate of the husband, his income, his age and earning capacity, and the age, health, station and separate estate of the wife."[77]

Almost every case in which alimony is granted contains language similar to the above.[78] Exception cannot be taken to such generalities, but unless their application to the facts of specific cases is known, appraisal of the actual utilization of the factors recited is impossible.

A very recurrent type of case is one in which the court describes its methodology at the outset of the opinion in impressive terms, such as, "The amount is not fixed solely with regard on the one hand to the actual needs of the wife, nor, on the other, to the husband's actual means. There should be taken into account the physical condition and the social position of the parties, the husband's property and income . . . and also the separate property and income of the wife,"[79] and then proceeds to dispose of the case in a single page.

In another case the court said, "their mutual troubles, criminations, and recriminations are told in a record of more than 800 pages. It is unnecessary to discuss this evidence in detail. It is sufficient to say that it exhibits a most lamentable condition of affairs, and fully sustains the learned chancellor in his judgment separating the parties."[80] The wife was awarded a divorce *a mensa et thoro* and alimony of $150 per annum but how much of these 800 pages of record related to the question of alimony is a mere conjecture, for the appellate court disposed of the case in less than two columns of the Reporter.

It is easy to sympathize with the attitude of the court here, for the inclination to conceal those facts which are essentially private is natural enough. Yet the practice leaves uncertain whether there has been a lack of thorough investigation on the part of the trial court or only a lack of thorough reporting on the part of the appellate court.[81] If the lack of evidence in the appellate reports, however, can be traced to alimony having been awarded in the lower courts on insufficient evidence, then one might be justified in saying that Mr. Husband was merely measured by the "Chancellor's Foot."[82]

[76] Felton v. Felton, 131 Neb. 488, 268 N. W. 341, 343 (1936).

[77] Heard v. Heard, 116 Conn. 632, 166 Atl. 67, 68 (1933).

[78] See, *e. g.*, Dayton v. Dayton, 109 W. Va. 759, 156 S. E. 105 (1930); Lonabaugh v. Lonabaugh, 46 Wyo. 23, 22 P. (2d) 199 (1933); Cary v. Cary, 112 Conn. 256, 152 Atl. 302 (1930); Dresser v. Dresser, 164 Okla. 92, 22 P. (2d) 1012 (1933); Metzger v. Metzger, 278 N. W. 187 (Iowa, 1938).

[79] Dietrick v. Dietrick, 88 N. J. Eq. 560, 103 Atl. 242, 243 (1918).

[80] Hughbanks v. Hughbanks, 25 Ky. L. Rep. 849, 76 S. W. 355 (1903).

[81] Only occasionally does one find a case in which the economic background of the parties has been fully presented. Wells v. Wells, 117 S. W. (2d) 700 (Mo. App. 1938), is such a case. The property owned by the husband was noted, his equity in it and the loans on it; his stocks, salary, bonuses and annual income were estimated. The financial background of the wife was also investigated and her equity in the property, her income and her previous experience as a wage earner were considered. The husband's annual income was found to be approximately $16,500 and the wife, granted a divorce on her cross-bill, was, on appeal, awarded alimony of $300 per month together with custody of a minor child for whose support $100 per month was allowed.

[82] "Equity is a roguish thing, for law wee have a measure, know what to trust too. Equity is according to ye conscience of him yt is Chancellor, and as yt is larger or narrower soe is equity. Tis all one as

Frequent resort to presumptions by the appellate courts lends strength to this suspicion. Typical of the cases are statements such as, "deference is due the decree of the chancellor who is presumed to know the needs of the wife and the ability and resourcefulness of the husband,"[83] or, "It is to be presumed that all the facts in existence at the time of the trial, bearing on the alimony . . . and defendant's ability to pay, were presented to the court."[84] Whether the appellate court is generally justified in thus giving the benefit of the doubt to the trial court may be questioned.

In any event, the instances are rare wherein the appellate court finds the evidence as to alimony insufficient and reverses the decree of the lower court. In one case the court said, "We have in the statement of material facts the bare finding of the wife's adulterous conduct with no finding as to the many circumstances which should at least be given sole consideration in determining whether an award in the nature of alimony should be made and in fixing its amount."[85] In another, alimony of $160 per month had been awarded to the wife on the basis of an income of about $6,500 a year from an estate, the title to which was in question at the time of the award. The husband denied that title was in him, which if true would have left him with no income. The court said, "On the record presented there is therefore no factual basis for the award made. . . . There is no prescribed standard for the admeasurement of alimony . . . but the factors which enter into and serve as a basis for the determination must be proved by legal evidence. And the burden of proof is upon the wife."[86] And yet in both of these cases, deficient as they were, alimony awards had been made in the lower courts.

Not only are reversals for inadequacy of evidence unusual but reversals for all causes constitute an exceedingly low proportion of the cases appealed. Seldom is the trial court found to have abused its discretion. In one instance, however, where the wife, who was the complainant, was worth about $170,000 and the delinquent husband about $160,000, an award of $75,000, being in lieu of dower and including an allowance for the support and education of two minor children, was reduced to $30,000.[87] In another case, where the husband made only $75 per month and owned nonproductive property valued at $200 and where the wife had property returning her $100 per year, an award of $75 per month was reduced to $30.[88] The appellate court may also increase the award. Thus in one case where the husband was worth about $5000 and this was mostly accumulated during the marriage with the material help of the wife, an award of $1000 was held to be inadequate and the amount was raised to $2250.[89] In another case, an award of $800 was raised to $1500 where both parties

if they should make ye standard for ye measure wee call a foot, to be ye Chancellors foot; what an uncertain measure would this be; One Chancellor ha's a long foot, another a short foot, a third an indifferent foot; tis ye same thing in ye Chancellors conscience." TABLE TALK OF JOHN SELDEN (Pollock's ed. 1934) 43.

[83] Ramey v. Ramey, 224 Ky. 398, 6 S. W. (2d) 470, 471 (1920).
[84] Plankers v. Plankers, 173 Minn. 464, 217 N. W. 488 (1928).
[85] Topor v. Topor, 287 Mass. 473, 192 N. E. 52, 53 (1934).
[86] Grobart v. Grobart, 119 N. J. Eq. 565, 182 Atl. 630, 631 (1936).
[87] Ferguson v. Ferguson, 147 Mich. 673, 111 N. W. 175 (1907).
[88] Folda v. Folda, 174 Ala. 286, 56 So. 533 (1911).
[89] Vey v. Vey, 150 Iowa 166, 129 N. W. 801 (1911).

were over sixty and where the husband was worth about $6200 and the wife was worth only about $1300.[90]

The infrequency of reversals testifies to the reality of the discretionary power allowed the trial judge; reversals for abuse of discretion are far more frequent in many other branches of the law. Infrequency of reversals also suggests a partial explanation of the brevity of opinions in alimony appeals: an appellate court is under more pressure to develop at length its reasons for reversal than for affirmance.[91]

The number of divorce cases that are taken to the appellate courts on appeal comprises but a minute fraction of the total number of cases heard in the trial courts. Of the cases appealed only a small proportion are reversed. On its face, this situation might seem to indicate a nearly perfect functioning of the divorce courts. But the statistics compiled in the Ohio and Maryland studies, set forth earlier in this article, suggest another explanation for the paucity of appeals. The average award of alimony is small, and, if this is an indication of the financial condition of the litigants, it is apparent that few can well afford to carry appeals to the appellate courts. This means that the operation of the trial courts is not often subject to check. Not only does this fact call for caution in assuming their proper functioning, but it enhances the importance of such guidance as the appellate courts can give in those cases that come before them.

As an element in guiding the trial court's discretion, a more businesslike approach to the financial situation of the parties, on the part of the appellate court, might materially aid and influence the handling of this type of case by both the trial court and counsel. If, instead of a random selection of items relating to the financial status of the parties, their assets and liabilities were fully and systematically presented in the opinion, the decision with reference to the award would be far more illuminating. The importance of adequate data as a basis for decision would be given the emphasis it deserves, and the example, if heeded by counsel, might render it necessary less often for the appellate court to indulge a presumption that sufficient facts were brought to the attention of the trial court. Moreover, a fuller development and discussion of the non-financial factors in the light of the facts available would make more understandable the disposition of the case. It is not enough to know that, say, age or social condition is a factor in the decision; it is important to know why and to what extent.

Consideration might be given to the adoption of some standard in the form of a certain proportion of the estate or income of the husband to serve as a guide only and to be deviated from as the facts suggest.[92] This would tend to advance predictability and to discourage capricious action. The danger inherent in this suggestion is that which is inherent in any mechanical device: the tendency to adhere blindly to the standard. If this were to develop, the element of flexibility, characteristic of judicial discretion and especially desirable in alimony cases, would, of course, be lost.

[90] Lawler v. Lawler, 157 Mich. 107, 121 N. W. 254 (1909).

[91] Especially is this true where the case is remanded to the lower court for further proceedings since it is then that the need for affording guidance to the trial judge is most evident.

[92] Other approaches to the problem of providing support for the divorced wife might eliminate the need for recourse to judicial discretion. Thus, utilization of the insurance principle has been suggested in Bradway, *Why Pay Alimony?* (1937) 32 ILL. L. REV. 295.

DIVISION OF PROPERTY UPON DISSOLUTION OF MARRIAGE

HARRIET SPILLER DAGGETT*

Property settlements following divorce furnish additional evidence, though none is needed, of the confounding of the emotional and social side of marriage with the business or economic phase of the unique contract. Nowhere has the law lagged so perceptibly and so distressingly as in the field of family relations. Tradition, prejudice, sentimentality and religion drug the reason of lawgivers. Progressive statutes when passed cannot always sustain the weight of the court's last words. The processes of granting divorce and awarding alimony or support demonstrate all too clearly these truths. That the infection also permeates the property concept is perhaps a more unfortunate aspect. Private ownership carries the notion of stability and justice in theory at least. Impressionistic ideas of *fault* fixed by individual judges, whose concepts are largely the result of their personal conditioning, determine the property settlement in many jurisdictions. The offending spouse must pay the money penalty of his marital wrong-doing. The penalty may not even be fixed. The paternalistic judge must estimate the fault and apportion the economic penalty under his own peculiar idea of social justice measured in terms of dollars and cents.

The upper and middle class strata of society are the ones upon which this burden rests. They have hitherto at least been considered the "backbone" of the nation, the stable group which, in the language of mechanics, serves as a "governor" for the social machine. Certainly they are as yet carrying the burden of taxation which means support of the indigent and delinquent groups with which a discussion of property settlements is not concerned since, in the main, they have no property. The great emphasis during the Rooseveltian era has rightfully been upon those who "have not" and well-organized state and national agencies of public welfare are now present to push legislation, perhaps too diligently, for those upon whom the eyes of the nation are centered humanely, and politically. The "forgotten man" may have moved into a different financial habitat, that of the middle class.

The variety of statutes dealing with property settlement after divorce is so great

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that in the space allotted here even a cursory comment on each is impossible. They defy any but the most general classification as both legislature and court seem to go to the most undreamed-of limits of individualism in this field of law. Every lawgiver is a self-anointed specialist in family relations and there is little check to his giving full reign to his concepts. There are no pressure groups to protect the interests of divorcees; no organized lobbies to insist upon measures for the equitable division of property; alimony clubs are laughed at; the whole divorce subject is taboo to politicians for nowhere lies material so explosive among the voters.

Statutes, special in everything but name,[1] are passed to fit the unfortunate domestic situations of favored individuals, who belong to no particular financial group but are politically well situated. These acts go through either unnoticed or under the unwritten law of silence in such matters. The situation must get so bad in this field that public opinion, generally, crystallizes and rebels, and this happens only after years of effort on the part of educational journals, civic associations and the like—the only groups that will take a stand on such dangerous and unpopular questions. The time is not yet but under the test noted above, would appear necessarily near, as the present social picture is very depressing. Obviously the whole matter is tied up with trends of opinion concerning ownership of private property generally, with attacks

[1] Louisiana has a prize specimen in Act No. 1 of the Second Extraordinary Session, 1934. It is set forth for examination:

"To amend and re-enact Article 142 of the Revised Civil Code of Louisiana relative to procuring judgments of separation from bed and board in certain cases, and providing further in said article for divorce after two years' separation in certain cases, and repealing all contrary and inconsistent laws.

Section 1. Be it enacted by the Legislature of Louisiana, That Article 142 of the Revised Civil Code of Louisiana, be and the same is hereby amended and re-enacted so as to read as follows:

Article 142. Whenever a marriage shall have been contracted in this State or elsewhere by parties either of whom are residents of this State and the matrimonial domicile shall have been established in a foreign country or in another state and if the husband shall have abandoned the wife, in the State of said marriage or elsewhere, or shall behave or have behaved towards his said wife in said foreign country or in said other state, in such manner as will entitle her, under our laws, to demand a separation from bed and board, it shall be lawful for her, on returning to the domicile where said marriage was contracted, or to her domicile in this State, prior to said marriage, to institute a suit against her said husband for the purpose above mentioned in the same manner as if the parties were domiciliated in such place, any law to the contrary notwithstanding.

Whenever a marriage shall have been contracted under the laws of and in this state, and there shall be issue of said marriage, and the husband or wife shall leave this state and secure a divorce in another state through substituted service in such other state, and contract another marriage in another state, of which latter marriage there is no issue, should the said husband or wife return to this state and remain and live separate and apart for a period of two years from the spouse acquired in said latter marriage, if the other spouse of said first marriage shall have remained single, either the husband or the wife of the latter marriage shall be entitled to immediate divorce upon said facts being established to the satisfaction of the court, provided both of the parties of the said first marriage shall make and execute a sworn affidavit and present same to the court, evidencing their intention to remarry with proof that there is one or more living and dependent minor children, issue of the said first marriage, dependent upon them for support. In such case suit may be filed by either the husband or the wife seeking to secure divorce from such latter marriage at their established place of residence in this state, and such person seeking divorce shall be entitled to secure service on the dependent [defendant] either by personal service or by substituted process through appointment of a curator ad hoc to represent such defendant if absent from the state.

In such cases an attorney shall be appointed by the Court to represent said absent defendant; the plaintiff shall be entitled to all the remedies and conservatory measures granted by law to married women, and the judgment rendered in such case shall have force and effect in the same manner as if the parties had never left the state or were both residents thereof."

upon the so-called capitalistic system, "soak the rich" sentiments and the like. These subterranean undulations may account in part for the great variety and many inconsistencies occurring in property settlements after divorce which ground upon the idea of purse-punishment for the spouse who has violated the community concept of marital good conduct, as estimated by the "discretion" of a "just" judge.

The states may be divided into three very loose categories for purposes of the discussion of property settlements after divorce. First are those jurisdictions where ownership of property remains undisturbed by a divorce decree and plays but an indirect part in alimony awards. Second are those jurisdictions where the courts, with or without legislative edict, may practically "let their conscience be their guide" in dividing property, whether it be joint, community, or separate. The third group is composed of a mixture of the first two, with infinite variety of combinations. In all three divisions the alimony idea is sometimes merged, sometimes concurrent.

This discussion will begin with the situations where the court has full or partial discretion, as the most obvious occasions for comment there occur, and a detailed illustrated analysis of specific statutes of particular states laying down rules for the non-disturbance of certain acquisitions would add little for such a general thesis. Furthermore, variation in the specific rule class is found as, for example, in the effect of divorce upon an estate by the entireties.[2]

The latest and best compilation of American family laws,[3] Professor Vernier's, states that twenty-two jurisdictions by statute give to the court some discretionary power in property disposition. One state "seems to have assumed"[4] that power. In seventeen jurisdictions the court "may divide the property of both parties, and in fifteen of these the power extends to all property, regardless of where the title is. In one state[5] it is the jury which makes the disposition."[6] Two more discretionary jurisdictions may be added to this list as disclosed by the 1938 supplement to Professor Vernier's work[7] bringing the grand total to twenty, equalling two-fifths of the fifty jurisdictions[8] considered.

Behind the discretionary power lies the fault and penalty idea. The judge awards the divorce decree to the non-offending or the less-offending spouse, presumably. He then makes the property settlement as an award for virtue and a punishment for vice in the marital relationship. His eye must also be kept, theoretically at least, upon custody and support of children, alimony, the life, health, need, social position,

[2] *Divorce as Affecting Estate by Entireties* (1928) 52 A. L. R. 890-894.

[3] 2 VERNIER, AMERICAN FAMILY LAWS (1932) 216.

[4] *Id.* at 217.

[5] *Id.* at 218: "Georgia (C. 1926, Secs. 2954-56, 2961): Party applying for divorce must render a schedule of the property owned by the parties at the time of application (or separation, if separated), distinguishing wife's separate property, if any. Jury may provide alimony from the corpus of the estate, considering, inter alia, the source from which the property came into the coverture. (As to transfers by the husband, in fraud of alimony, see Sec. 111.) The jury must specify the disposition to be made of the scheduled property, and its verdict is carried into effect as in other chancery cases."

[6] *Id.* at 216.

[7] District of Columbia and New Mexico. VERNIER, AMERICAN FAMILY LAWS (1938 Supplement) 60.

[8] 48 states, District of Columbia, and Alaska.

financial status, earning power, etc., of the spouses and even upon their kin and in some cases the latter's needs and purse. Within his discretion also lies the final stamp upon appraisals of property and its income value, and the decision as to the nature of the ownership of the property, whether it is indeed separate or joint or only simulatively so, together with questions of fraudulent manipulations, concealment, etc. Documentation is legion for these principles which are well known to lawyers and, indeed, to increasing numbers of laymen. A few illustrations of legislative and judicial pronouncement from the 1926-1938 annals may be instanced to make concrete the general principles involved.

The Supreme Court of Kansas[9] in 1928 gave judgment of divorce to a wife, the husband having been found guilty of "gross neglect of duty and extreme cruelty," and awarded her one-half of the property upon which the spouses had been living and which was to vest in the husband by the joint will of his parents, one of whom was dead. She also received judgment for $40 per month support, her clothing and personal effects, and attorney's fees. In Oklahoma, the wife is entitled to a "reasonable" division of "jointly acquired property" as a matter of right, after divorce. Jointly acquired property must be such as was acquired as a result of "joint industry, efforts, management, judgment, capacities, and earnings of both husband and wife or at least as result of some of them."[10] "Equitable division" are the words used in another Oklahoma case[11] and the interpretation indicated is that the phrase does not necessarily mean equal division.

In Michigan the division of property must be "equitable"[12] but an award to a wife of a large part of the husband's property was held not to be error even though most of the property was inherited by the husband shortly before the commencement of the action.[13] The court stated that there was no rigid rule of division, security of living for the wife being the major consideration. In Kentucky the court has declared that generally a blameless wife with no property should be allowed in the neighborhood of one-third of the husband's estate in absence of any other qualifying facts.[14] In Nebraska the trial court may divide property acquired during the marriage by the joint efforts of the spouses "as demands of equity may require."[15]

In Utah, "in determining property settlement in divorce case, the court should consider amount and kind of property owned by each of the parties, whether property was accumulated before or during coverture, ability and opportunity of each to earn money, financial condition and necessities of each party, health of parties, standard of living of parties, duration of marriage, that which wife gave up by marriage, and

[9] Mecke v. Mecke, 126 Kan. 760, 271 Pac. 275 (1928).

[10] Joiner v. Joiner, 112 S. W. (2d) 1049 (Tex. Comm. App. 1938), reversing 87 S. W. (2d) 903 (Tex. Civ. App. 1935).

[11] Hughes v. Hughes, 177 Okla. 614, 61 P. (2d) 556 (1936). OKLA. STAT. (1931) par. 642.

[12] Robinson v. Robinson, 275 Mich. 420, 266 N. W. 403 (1936).

[13] Hallett v. Hallett, 279 Mich. 246, 271 N. W. 748 (1937).

[14] Taylor v. Taylor, 263 Ky. 208, 92 S. W. (2d) 72 (1936).

[15] NEB. COMP. STAT. (1929) par. 42-321; Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409 (1936).

age of parties when married."[16] To check this number of variables and balance them the one against another would seem to be a human impossibility. Perhaps a judge, consciously or otherwise, sets up for himself some control factor for his individual guidance.

In the cases cited, which are by no means "selected" in the accepted sense of the word but drawn from a lengthy file, the words "just," "reasonable," "equitable," and the like are the keys. When the court's discretion is limited by the cause of the divorce, as "extreme cruelty," for example, but another rubber term is added with further complexities, uncertainties and greater judicial responsibilities. A sound and stable property basis both during and at dissolution of marriage furnishes the firmest foundation of marriage as it does of a community. The greatest evil is not so bad when certain. To throw the whole burden upon the discretion of the court is to open greater doors to instability than ever. Vested interest is circumvented. Pride of possession is thwarted.

If the fault and punishment idea is to be controlling, the spouse would be better protected under criminal statutes with set penalties than under a doctrine based on that idea but uncertain in application. In the latter situation, the proposition becomes a gamble and attracts the same methods. The application of tort and misdemeanor technique, with the court defining the marital "crime" and measuring out justice, makes of the judge at once a legislator, jury, jurist, and executive. No matter how paternalistic his mien, his exercise of such powers is a matter fraught with all of the dangers experienced by the individual in contest with the state and has more imponderable repercussions on society. *"Guilty"* of adultery is the phrase used in Tennessee[17] and this word and its connotations flow throughout the jurisprudence everywhere. When a person is found "guilty" of a wrong against the state, his punishment, bodily or financial, is set forth with certainty or at least with such approximation thereto as is afforded by maximum and minimum limits. In contrast, virtual confiscation of property and judge-set penalty are the rule in the property settlements of divorce.

The federal court's policy of hands-off in regard to the states' regulation of their internal and domestic affairs of "police," in which in general marriage and divorce may be said to be lumped, plus the concept that marriage is a personal "status" regulated by the state, have removed most of the federal constitutional brakes from state legislation. Life, liberty, property and the pursuit of happiness are nowhere tied up as they are in a marriage contract, and yet the lives of children through custody provisions, and of children and spouses through support provisions, liberty through personal action, property through the acquisition and settlement arrangement, and happiness through the most emotional experiences of mankind are left almost entirely to the vagaries of the state legislature and judiciary. Even the vested

[16] Pinion v. Pinion, 92 Utah 255, 67 P. (2d) 265 (1937).

[17] See TENN. CODE (Williams, 1932) par. 8452; Tenn. Acts 1835-36, c. 26, §§1, 6, 7; Cole v. Parton, 172 Tenn. 8, 108 S. W. (2d) 884 (1937).

right idea,[18] ingrained in the layman, seems to be disappearing from this field of law, as well it might after so many defeats, and hence state and national constitutions are seldom relied upon to disturb the willy-nilly property settlements by the court, made with or without legislative sanction.

The theory of community property presents the soundest and most equitable base of all systems, in the writer's judgment. The system of a community of acquets and gains during the marital period seems the most satisfactory of the various community regimes.[19] When the earnings, income and assets of the two individuals vest jointly during coverture, a real economic, as well as conjugal partnership, results. Thoughtful students[20] of modern marriage have expressed the view that the wife in the home should feel that her efforts are materially rewarded. The sense of satisfaction derived from the fact of remuneration would prevent, in cases where it is not necessary or desirable, the seeking of outside employment in industrial areas and elsewhere with the consequent dissatisfaction and disintegration of the family as a unit. Furthermore, the wife who is unable to earn money outside of her home would not have the feeling, despite her drudgery, of being a liability rather than an asset. The husband and children are more apt to put a higher estimate upon the efforts of the woman of the household if her job is evaluated in terms of dollars and cents. She, in turn, has a greater interest in conserving and augmenting the family finances and takes greater responsibility in these matters. Clearly, these remarks are not intended for those wives who have aptitude and ability better suited to make contributions to the family and society by efforts outside the home rather than in it. The suggestions are applicable to those wives who leave the home merely to satisfy the urge to "make money" by their own efforts without the realization that their services would be far more remunerative in the real sense in their homes. Under the community plan, this result may be obtained without loss to the family budget. As the community property is acquired or augmented it vests in the wife and husband equally, contingent upon a final accounting at dissolution.

Whatever may be said about the weaknesses of the plan so far as the features of control,[21] administration, and the like are concerned, the nucleus of the concept seems sound. In answer to the attack made upon the economic partnership idea that one of the members may be a drone and waster, it may be pointed out that under any system one of the spouses may be in the "kept" class and if the producing member does not feel able to continue the luxury he can dissolve the partnership with certainly no greater economic loss under the community plan than is experienced under other property settlements elsewhere in evidence. The settlement is certain. One half vests[22] in each spouse at the dissolution of the marriage by divorce or otherwise, and

[18] See 2 VERNIER, AMERICAN FAMILY LAWS 215.

[19] GERMAN CIVIL CODE (trans. by Chung Hui Wang) art. 1347 *et seq.*, art. 1519 *et seq.*, art. 1549 *et seq.*

[20] JACOBS AND ANGELL, A RESEARCH IN FAMILY LAW (1930) 647, citing Miss Hildegarde Kneeland (May, 1929) 143 ANNALS 38.

[21] Daggett, *Is Joint Control of Community Property Possible?* (1936) 10 TULANE L. REV. 589.

[22] Daggett, *The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study* (1931) 19 CAL. L. REV. 567.

neither spouse is in doubt of the outcome of a property settlement, except as regards alimony. This civilian plan, primitive in origin, justice and simplicity, has become so intricate and encumbered with common law legislative trimmings as to be scarcely recognizable in the United States except in Louisiana, the only civilian state. In the latter state, upon divorce or other dissolution of the community the portions vest of right in the spouses regardless of *fault*.[23] The only evidence of penalty is in the award of a bigamous husband's share to the putative wife in good faith.[24] The concept of ownership of private property is preserved. The economic aspect of the marriage contract is segregated from the emotional and personal. Punishment or property penalty for violence to the marital relation is absent. The judge has no power, discretionary or otherwise, except in deciding on whether the partnership should be dissolved.

Unlike Louisiana, in each of the other seven states[25] of the union having a so-called community property regime, statutes are in existence empowering the court to effect the division of the community according to his ideas of "justice," "fault," "penalty," etc., and this despite the claims for a present vested interest in the wife of her share *during the existence* of the community.[26]

California, Idaho and Nevada vest the court with discretion to divide the community as they think "just and proper" when divorce has been granted on grounds of adultery or extreme cruelty. Since adultery is well known to be the most fertile ground for fake, employment of guttersnipe witnesses, fraud and connivance of the lowest order, the dangers in having no fixed rule for property settlement are multiplied. The refinement of the ground of cruelty into degrees with the superlative classification of "extreme" makes for more uncertainty. What might be extreme cruelty to a spouse or to a judge of refinement and supersensitivity might well be a relatively unimportant matter to persons in a different walk of life or of radically different temperament.[27] All of these subjective, "psychic" questions are in the hands of the judge who will react according to his internal indicators and reach property settlements of like individuality.

In *Tipton v. Tipton*,[28] the Supreme Court of California reversed an award of *all* of the community to the offending husband as being in the teeth of the statute which provides that, when the divorce is granted on the grounds of adultery or extreme cruelty, the community property must be assigned "in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just."[29] The Supreme Court stated that the plain inference to be derived from the statute was that the nonoffending spouse was entitled to *more* than the amount given to the guilty one, as under other provisions as in case of desertion, one half was to be

[23] DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA (1931) 84 *et seq.*
[24] *Id.* at 117 *et seq.*
[25] MCKAY, COMMUNITY PROPERTY (1910) 39 *et seq.*
[26] BURBY, CASES ON COMMUNITY PROPERTY (1933) 300n.
[27] Schlater v. LeBlanc, 121 La. 919, 46 So. 921 (1908); Weiser v. Weiser, 168 La. 847, 123 So. 595 (1929).
[28] 209 Cal. 443, 288 Pac. 65 (1930).
[29] CAL. CIV. CODE §146, subd. 1.

flatly awarded to each.[30] The lower and the appellate courts' ideas of justice seem to be wanting; to be extreme; to depart from the statute; to be without guide or reason.

In *Quagelli v. Quagelli*,[31] another California decision, the trial court did not make out a case of "extreme cruelty" by the husband. The district court of appeals granted the wife a decree on that ground as the trial court's decision was "subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court."[32] The higher court declared that this judgment "would of course, entitle her to an award of more than one-half of the community property"; that "on this question, the cases are all in accord"; that the share must be "substantially" greater than to the unoffending one; that what the difference should be depends upon the "circumstances of each case."[33]

In *Shapiro v. Shapiro*,[34] also a California decision, after a judgment against the husband for "extreme cruelty" the wife was awarded $34,847.25 and the husband $19,468.22. There was contention that the court had adopted the lowest valuation for property awarded the wife and the highest for property awarded the husband; also, that the property producing the highest income was awarded the wife, while that of lowest income was given to the husband. The court of appeals did not disturb the judgment of the lower court in the face of so much conflicting evidence but the rule was again stated to be that there *must* be a substantially greater award of property to the one obtaining the divorce on grounds of "extreme cruelty."

In *Cunha v. Cunha*,[35] however, the lower court was said not to have abused its discretion in failing to award more than one-half of the community to the wife who had been the victim of "extreme cruelty." This innocent and outraged wife tried to force the husband to plead the statute of limitations on a debt to his mother in order to augment the assets of the community but the court fortunately found against her on this point. She also wanted maintenance in addition but was refused. However, the judgment of the lower court was reversed in any event because the trial court did not properly evaluate a crop and had erroneously given a lien.

Idaho, another so-called community property state, has a provision similar to that of California. In *Beckstead v. Beckstead*[36] the lower court had awarded judgment to the husband. The wife who had sued on grounds of cruelty and nonsupport, appealed, the main contention being in regard to the property settlement. The statute provided that in cases of extreme cruelty the community property was to be divided as the court deemed "just."[37] No extreme cruelty was found as the marital misdemeanors of the wife only involved "pain, annoyance, . . . nagging . . . et cetera. . . ." However, $8,100 was awarded the wife out of a community valued at $22,000. The substitution by the Supreme Court of their discretion in rearranging amounts and terms of settlement for that of the trial court was correct under another statute.[38]

[30] See also Warden v. Warden, 218 Cal. 98, 21 P. (2d) 418 (1933).
[31] 99 Cal. App. 172, 277 Pac. 1089 (1929).
[32] *Ibid.*
[33] 8 Cal. App. (2d) 413, 48 P. (2d) 130 (1935).
[34] IDAHO CODE ANN. (1932) §31-712(1).
[35] See CAL. CIV. CODE §146.
[36] 127 Cal. App. 20, 14 P. (2d) 1058 (1932).
[37] 50 Idaho 556, 299 Pac. 339 (1931).
[38] *Id.* §31-714.

In Arizona, also a communiy property state by classification, the Supreme Court in *Schuster v. Schuster*[39] affirmed a judgment wherein the husband was given his separate property out of which he had to pay alimony for wife and child. The wife was awarded *all* of the community property consisting of $1,000 in realty, $85 cash and $245 in uncollected debts. The court said: "The question of the proper division of the community estate, and of the value of appellee's separate property upon which depended his ability to pay alimony, money for the support of the child and attorney's fees, like the two assignments just considered, were addressed to the discretion of the trial court, and there is nothing indicating any abuse thereof whatever."[40]

These cases are illustrative of the many that demonstrate the facts that there is no stability or certainty in regard to property settlements; that the courts, apparently so used to wide and flexible powers of discretion, do not seem to be guided by the few limitations which the statutes do set; that the "discretion" of the lower court may not be that of the higher; that the property of the wife, the husband and the community is juggled freely and indiscriminately at the pleasure of the "just" judge.

The most disheartening thing about the rules of property settlement in states operating under the community property system is that they would appear to be retrograding rather than progressing. The true civilian ideal of community property is one of economic partnership, predicated upon the supposedly mutual efforts to augment the estate. Until dissolution of this economic partnership, it makes no difference whether one contributes more energy to the task with better material results than the other; nor does it matter if one makes no contribution at all. The conjugal partnership, the emotional or personality side of the marriage, is a distinct and separate matter which is apart from affairs of property. If the marriage fails because of the unfavorable personal interaction of the individuals composing it, ownership of property is nevertheless fixed by the original articles of marriage partnership and is as untouched by the cessation of amicable relations of the spouses or the causes thereof as it would be between two commercial partners.

Common law marriage did not have in its beginnings the equal evaluation of the individualities of both spouses. The merger theory, not accepted in the civil law, obtained in the common law, and hence each step away from that theory of the wife, which treated her virtually as a chattel, is now considered a progressive one. If, however, those states which have adopted the civilian notion permit the type of statutes instanced above—forward looking from the common law point of view in many instances—they are nevertheless losing ground under the modern view, as their start was so far ahead of the common law notion.[41]

All of the so-called community property states now maintain that the wife has a present vested interest in her share of the community property because of the saving to the family under the joint federal income tax return.[42] There was never any

[39] 42 Ariz. 190, 23 P. (2d) 559 (1933). [40] *Id.* at 196, 23 P. (2d) at 561.

[41] Daggett, *The Civil-Law Concept of the Wife's Position in the Family* (1936) 15 ORE. L. REV. 291.

[42] JACOBS, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS (2d ed. 1939) 720, collecting cases. See also note 26, *supra.*

question but that the husband's share was presently vested, obviously. How this theory can be held compatible with the laws for settlement upon the dissolution of the community by divorce is hard to deduce unless one accepts the most arbitrary right of the lawgiver to regulate "public policy" of marriage and divorce.

It would be a practical impossibility to set an inflexible rule to cover every financial aspect arising from a divorce. The needs, earning power, standards of living and all the rest of the innumerable variables must be considered. All of this, however, can be arranged within the limits of alimony provisions and need not be repeated and confused with ownership of property. Enough of difficulty, inequity, fraud and heartbreak proceeds from one category of this kind without the necessity for two. Alimony or support is assumed by marriage and, in proper cases, should be continued at the termination of this social status. Since legislatures are very properly beginning to provide alimony for deserving husbands[43] as well as wives, there should be no reason why the whole matter could not be handled in this wise, *provided* that proper *limits* and regulations are set upon that sadly abused method.[44] Maintenance is a humanitarian or social principle imposed in the interest of the state, as are laws requiring the support of blood relatives in need by those who can afford it, rather than imposing the burden upon the public except in cases where it cannot be sustained by the family.

"Extreme" cruelty, attempts upon the life, *et cetera,* are punishable by the criminal statutes of the state, and punishment for those offenses should be left there and not increased by the imposition of confiscation of property by divorce proceedings. If adultery is thought to be a crime against society, then it falls in the same category; if not, why should it have any other rôle than cause for divorce in the affairs of these spouses? Undoubtedly much of the so-called scientific literature on sex is unmitigated trash, but sound investigators have surely established as a fact that undue disturbances of this variety are in a class with emotional or nervous disorders and in the extreme are as truly an illness and as uncontrollable as insanity. The religious and moral background of marriage has given this offense a high place in the list of marital "crimes" which may have been warranted as protection for the family unit before general practice of birth control. If the modern scientific approach to the situation is correct, it may come in time to be classed in its less acute stages with other forms of incompatibility.

The true community or partnership idea of the assets of the spouses accumulated by their joint efforts seems a practical and simple method of giving each a sense of security, reward, accomplishment and justice. Just why either should lose the owner-

[43] 2 VERNIER, AMERICAN FAMILY LAWS 262: "Modern agitation and legislation looking toward 'equal rights' has manifested itself in fifteen jurisdictions which allow alimony to the husband and in twenty-five jurisdictions which enable the court to award him part of his wife's property. . . . If alimony is desirable at all, it would seem to be most readily justified on the ground that it places the obligation to support a spouse who is in need upon the party who has undertaken to share the responsibilities and pleasures of such spouse by entering into the solemn compact of marriage, rather than upon the state."

[44] For a discussion of the handling of this problem in the courts, see Cooey, *Judicial Discretion in the Determination of Alimony Awards, supra,* p. 213. ED.

ship of his part, accumulated by the effort of years, because of having failed in the emotional or individual side of marriage seems hard to discover. Why separate property of inheritance should be awarded to the one who happened to get on the lucky side of a divorce judgment, perhaps because of being adept in the doubtful technique of such litigation, seems even harder to understand.

The personal ownership of property is, in the writer's judgment, a stabilizer for the individual and for society. Certainly it should be for the family. Many thrifty spouses have been kept together because of their interest in having the business affairs of the marriage protected. While financial concern may not be the highest ideal for marriage, it is a safe and sane one. It gives intelligent persons something to fall back upon when the romantic aspects of their association have faded. It is particularly valuable as a binder in childless families which are unfortunately becoming more numerous. It appears to have more value as a deterrent from divorce, if that is the accepted objective, than the gamble of gain or loss dependent upon a court's notion of marital wrong and its penalty in property settlement which prevails presently in too great a number of jurisdictions.

Proper laws for safeguarding the ability of both individuals to accumulate property either jointly or separately during the marriage should be in existence, an objective which at this date certainly has not been achieved. Thereafter, there should be no confiscation of this private property for the private use of either partner at the dissolution of the marriage any more than there is upon the dissolution of any other partnership.

GROUNDS FOR THE MODIFICATION OF ALIMONY AWARDS

EUGENE DESVERNINE*

A fertile field of litigation in the realm of domestic relations arises in connection with the modification of divorce decrees relating to alimony. The frequency with which divorced parties seek judicial amendment of the orders awarding alimony indicates the social significance of the matter and warrants an investigation of the bases upon which the courts operate in determining such controversies.[1] With this objective in view a study has been made of all the cases involving modification of alimony decrees which reached the appellate courts during the period comprehended between the years 1926 to 1938 inclusive.[2] Proper treatment of all the issues which arise in such cases would necessitate an inquiry into a diversity of legal problems, such as the existence and extent of the judicial power of revision, which lie beyond the scope of this paper.[3] Attention, therefore, will be focused exclusively on the substantive considerations which determine whether or not a given award will be changed as revealed by the cases examined.

At the outset much confusion will be avoided by an exposition of the distinction between the modification of a decree awarding alimony by an appellate court to which the case has been brought on appeal from the decision in the original divorce court,

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[1] 142 cases involving revision of alimony orders are cited by the Third Decennial Digest, 1916-1926; for the following decade the Fourth Decennial cites 253 such cases. In view of the fact that these citations represent mainly appellate decisions, the number appears to be substantial.

[2] The cases cited by the Fourth Decennial Digest, 1926-1936, and the yearly Digests for 1936, 1937, and 1938 have been analyzed. Although the selection of this period has been in a large measure arbitrary, due regard was had for the importance of contemporary decisions in a field where the law is undergoing rapid evolution.

[3] Perhaps the most consequential of these problems relates to the power to modify or cancel past-due installments of alimony. The majority of states deny the power as to such installments, but a minority permit modification. See 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS (6th ed. 1921) §1830; cf. Jacobs, *The Enforcement of Foreign Decrees for Alimony, infra.* p. 261, notes 70, 71.

Much litigation has arisen as to the extent of the court's power to modify decrees entered by consent. Where the court has approved an agreement between the parties relating to alimony, this is generally regarded as a contract which cannot be modified except by the parties themselves. 17 AM. JUR. (1938) §649. *Contra:* Low v. Low, 79 Colo. 408, 246 Pac. 266 (1926); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1926). However, the decree may be altered to the extent that it is not dependent on the parties' agreement. 17 AM. JUR. §649. As to what constitutes a reservation of a power to modify a decree based on agreement, compare Crawford v. Crawford, 129 Misc. 683, 221 N. Y. Supp. 551 (1927), and Folz v. Folz, 42 Ohio App. 135, 181 N. E. 658. On the power to modify decrees based on agreements, see (1933) 19 VA. L. REV. 513; (1937) 22 WASH. UNIV. L. Q. 263, 392; (1938) 26 CAL. L. REV. 491, 707.

and modification of a decree upon independent petition by one of the parties. Aside from procedural differences, the distinction is important in that the rules which determine a court's disposition of a case in each situation are widely dissimilar. In the former the court is concerned with the propriety of the lower court's decision on the facts and evidence introduced before it, whereas in the latter the decision of the original divorce tribunal is not open to attack and the court is exclusively concerned with the situation of the parties as it exists at the time of the petition. There is no time limitation operating against a party who seeks revision of an alimony decree by the second method, and no restriction on the number of times a petition may be brought. Courts are wary of attempts by parties to a divorce proceeding to appeal from the part of the decree with which they are dissatisfied without complying with the statutes and rules governing appeals, and will not entertain a petition unless properly supported by a showing of the required conditions.[4]

The rule which permits a change in the terms of the alimony decree to conform to new circumstances is derived from the ecclesiastical courts, which restricted it to cases of limited divorce.[5] Where an absolute divorce has been granted it is generally held in this country that the power to alter a decree after it has been made does not exist in the absence of the reservation of such power in the decree itself, or of statutory authority.[6] Such statutes may be found in the majority of the American jurisdictions,[7] and the matter is usually left within the discretion of the court to make such revision "as circumstances may require,"[8] "as may be proper,"[9] "as the case may require,"[10] etc. Unless extraordinary circumstances justify such a course, the modification will not be made by the court on its own motion, but will be considered only upon application by one of the parties.[11] Courts make the granting of relief dependent upon the showing of "changed circumstances,"[12] "changed conditions,"[13] "a change in the situation of the parties,"[14] or a showing that the original decree is "no longer fair and just."[15] Therefore, a petition which fails to allege that the conditions upon which the relief is predicated did not exist at the time of the rendition of the final divorce decree is fatally defective.[16] Occasionally, however, it is

[4] Glad v. Glad, 51 S. D. 574, 215 N. W. 931 (1937).

[5] See Alexander v. Alexander, 13 App. D. C. 334 (1898).

[6] 2 SCHOULER, *op. cit. supra* note 3, §1828. Statutes granting the courts power to modify alimony decrees are held not to apply where no alimony has been granted in the original decree. *Id.* §1807. A decree awarding alimony in gross may not be modified after full performance. *Id.* §1830.

[7] For a compilation of the statutory authority on this subject, see 2 VERNIER, AMERICAN FAMILY LAWS (1932) §106, Table LIV and 1938 Supplement.

[8] N. J. REV. STAT. (1937) §2:50-37.

[9] Mo. REV. STAT. (1929) §§1355, 1361.

[10] MISS. CODE (1930) §1421.

[11] In McPartland v. McPartland, 146 Misc. 672, 261 N. Y. Supp. 844 (1933), where the husband was imprisoned for contempt for failure to pay alimony, the court modified the order on its own motion to exempt him from making the payments during his imprisonment. Likewise, in Andrews v. Andrews, 144 Ore. 200, 24 P. (2d) 332 (1933), the court reduced the alimony when it found the husband had become a paralytic cripple, upon citation for contempt for failure to make the payments.

[12] Smith v. Smith, 334 Ill. 370, 166 N. E. 85 (1929).

[13] Badger v. Badger, 69 Utah 293, 254 Pac. 784 (1927).

[14] Holida v. Holida, 183 Minn. 618, 237 N. W. 2 (1931).

[15] Low v. Low, 79 Colo. 408, 246 Pac. 266 (1926).

[16] *Ex parte* Allen, 221 Ala. 393, 128 So. 801 (1930).

difficult to avoid a suspicion that courts have been moved to modify decrees on the basis of their reaction to the propriety or impropriety of the original award, and not, as claimed, on the theory that subsequent conditions have rendered its enforcement unfair. It is not surprising, therefore, to find a court rebelling at the requirement of "changed circumstances."

In *Cohen v. Cohen*,[17] the husband[18] applied for a reduction in his alimony payments from $25 to $15 a week on the ground he was unable to pay over that sum. Although he neither alleged nor proved that the conditions of the parties had changed since the time of the decree, he was granted the reduction. The applicable statute authorized the revision of the decree "from time to time as circumstances may require," and it was held in an opinion by the lower court that an application for modification should be decided "in accordance with the very right of the matter at the time it is before the court for disposition, . . . in accordance with equity and good conscience." The requirement that changed circumstances be shown, said the court, necessitated an examination of the factors on which the original order was based. This is rendered difficult by the fact that in most cases the testimony of the parties in the divorce action is not readily obtainable; often it has been made in the course of a final hearing and it has not been preserved. "More than once," said the judge, "I have been detained while I sought, without success, to ascertain the basis of an order for payment made some years before." The court, however, recognized the danger of a universal application of the policy it pretended to adopt by warning that only "meritorious applications" would be considered and that "petitions without merit will not only be discouraged but will trouble the applicant."

The notion that a decree which is inequitable at the time it is sought to be modified cannot be changed simply because it was also inequitable at the time it was granted may be offensive to one's sense of justice, and the practical difficulties encountered in obtaining the evidence adduced before the court in the divorce action should not be underestimated. But the rule adopted in *Cohen v. Cohen* is no less subject to practical objections. What criterion should the applicant employ to determine in advance whether his application is meritorious or otherwise, and what effective check would there be against attempts by parties to attack a decree collaterally, when they are precluded from doing so directly? Such a procedure would amount in many cases to a retrial of the same issues in clear violation of the established doctrine of *res judicata*.

Since the establishment of changed conditions is generally a condition precedent to relief, it becomes pertinent to inquire what new circumstances will warrant a modification of the alimony order. The decision of the lower court with respect to this issue will not be overruled on appeal unless its action constitutes a clear abuse of discretion. The difficulties encountered in estimating what amounts to such an abuse are the same as those presented by the appellate reports where the original

[17] 15 N. J. Misc. 666, 194 Atl. 257 (1937).

[18] In the interests of convenience, the terms "husband" and "wife" will be used, although technically inaccurate because of the dissolution of the marriage.

award is under review. Since the problem of control of the lower court's discretion is treated at some length in the course of a study of original awards included in this symposium,[19] no special consideration will be devoted to that aspect of the problem in this article.

The ability of the husband to make the payments and the needs of the wife may be said to constitute the basic alimony equation. In principle, therefore, a change in either of these two factors should bring about a change in the result, and this is apparently the theory upon which the decree is altered. In practice, however, the seeming simplicity of the equation is disturbed by the fact that the two basic considerations mentioned are not the only determinants of the award and that for obvious reasons it is inexpedient to amend the order when the change is insignificant.[20]

Attention will first be given to the circumstances which effect variations in the husband's ability to pay the sum decreed. That "one cannot get blood out of a turnip" is a truism particularly applicable to an improvident husband, and a reduction in the source from which the payments are made should lead to a reduction in the payment. A decline in the husband's monthly salary from $400 to $175 has been held to warrant a decrease in the alimony payable by him from $150 to $87.50 per month,[21] while demotion of an engineer to the position of fireman with the consequent reduction in earnings from $250 to $150 monthly has induced a reduction in his payments from $45 to $35 a month.[22] On the other hand, a fall in the husband's yearly earnings from $58,000 to $16,000 was held in another case[23] to support a modification of the decree from $12,000 to $7,500 per annum. A substantial drop in the price of a commodity which constitutes the husband's sole source of income,[24] or a showing that his interest as remainderman under a trust has materially depreciated in value,[25] or that a substantial part of his estate has become worthless since the award of the decree,[26] have all been held to justify a decrease in the payments.

The acuteness of the financial depression in the early years of this decade and its burden on the professions was judicially noticed by the court in *Williams v. Williams*,[27] wherein the payments of a divorced lawyer who had undergone bankruptcy proceedings were reduced from $500 to $325 a month on his showing that his present income was $10,900 a year. In contrast is the attitude shown by the court in *David v.*

[19] Cooey, *The Exercise of Judicial Discretion in the Award of Alimony*, *supra*, at pp. 221-224.

[20] In Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1926), it was stated that in making a change in the alimony award, the court should take into consideration the property and income of the parties, their ages, health, and social conditions, and whether there are any children dependent upon one or both of them for support. For all the factors which are considered by the courts in making the award, see Cooey, *The Exercise of Judicial Discretion in the Award of Alimony Cases*, *supra*, at pp. 217-221.

[21] Miller v. Miller, 114 W. Va. 600, 172 S. E. 893 (1934), reversing the decision of the lower court.

[22] Boquette v. Boquette, 215 Iowa 990, 247 N. W. 255 (1933), affirming decision of the lower court.

[23] Luedke v. Luedke, 215 Wis. 303, 254 N. W. 525 (1934).

[24] Hendricks v. Hendricks, 91 Utah 553, 63 P. (2d) 277 (1937).

[25] Kennard v. Kennard, 87 N. H. 320, 179 Atl. 414 (1935).

[26] Watson v. Watson, 113 W. Va. 267, 168 S. E. 373 (1933).

[27] 12 N. J. Misc. 641, 174 Atl. 423 (1934), in opinion by the lower court.

David,[28] where no sympathy was accorded to the pleas of the divorced husband for reduction of the award on the ground that the prevailing depression had greatly lessened his ability to make the required payments. Holding that the petitioner, in times of good fortune, should "have provided for all possible exigencies, including the one from which he now seeks to escape," the court observed that "no patience or sympathy is had for those who seek to take advantage of present conditions in order to foil an obvious and indisputable duty."

Allegations of ill health and physical incapacity on the part of the husband are usually accompanied by a showing of decreased income which will justify a reduction. Thus, where the petitioner had sustained injuries in an automobile accident which were found to have reduced his earning capacity as a physician, his present income being insufficient for his own support, the court cut the award from $200 to $100 a month.[29] The husband has likewise been entitled to a modification of the order when he showed his health had been impaired and that he did not have sufficient funds to obtain necessary hospital treatment.[30] But proof of ill health subsequent to the decree will not support a revision at the instance of the husband where it appears his earnings have increased.[31]

Unfortunately, the reported decisions in many cases furnish inadequate, if any, information concerning the financial status of the parties and therefore fail to throw any light on the issue of what constitutes a "substantial decrease" in income which will entitle the party to a downward revision of the decree. Apparently a showing by the husband that financial reverses have lessened or terminated his ability to meet the terms of the payments seldom fails to bring relief from the courts. A reduction from $35 to $30 a month in the man's compensation and indebtedness in the sum of $213 have been held not to be a sufficient change of condition to warrant modification,[32] but usually a refusal to revise the order on the basis of decreased income is induced by a finding that the applicant's allegations concerning his financial difficulties are inaccurate or untrue. Courts have denied the husband's application for reduction when they have found that his financial position was even better than at the time of the original decree.[33] In another case the petitioner's claim that his property and income had fallen in value, rendering it difficult for him to meet the $30 weekly payments, failed to impress the court, which found that his annual income was $5,000 (it is not stated what it was formerly) and that his second wife was gainfully employed.[34] A much stronger case was presented by a petitioning husband who sought a reduction in his $285 monthly alimony payments, but the court refused to grant him any relief although his income had admittedly fallen from

[28] 146 Misc. 444, 261 N. Y. Supp. 456 (1933), in opinion by the lower court.
[29] Junger v. Junger, 215 Iowa 636, 246 N. W. 659 (1933), affirming the lower court's decision.
[30] Carson v. Carson, 87 Utah 1, 47 P. (2d) 894 (1935), reversing the lower court's decision.
[31] Kirk v. Kirk, 222 Iowa 945, 270 N. W. 432 (1937).
[32] Carson v. Carson, *supra* note 29.
[33] Sauve v. Sauve, 243 Mich. 33, 219 N. W. 662 (1928); Texter v. Texter, 251 Mich. 53, 231 N. W. 140 (1928); Molema v. Molema, 103 Cal. App. 79, 283 Pac. 956 (1930).
[34] Schweim v. Schweim, 233 Mich. 67, 206 N. W. 353 (1926), affirming decision of the lower court.

$16,000 to $7,000 a year.[35] The fact that he had failed to reduce his living expenses and lived in apparent luxury was doubtless the determining factor in the decision.

A party may not escape the obligations of an alimony decree by spending more than his income,[36] nor, apparently, may he do so by deliberately refusing to work or to take advantage of his earning capacity.[37] It follows that earning capacity, even in the absence of actual employment, is an element to be considered in determining the measure of alimony the husband shall be required to pay.[38] In one case the wife sought an increase in the payments on the ground of her ill health. The husband claimed he earned only $2800 a year, but the court concluded from the findings that he was *capable of earning* at least $6,000 a year, which added to $3000 he received from his great-grandfather's estate, made an annual income of $9,000, and the award was increased from $720 to $4,000 a year for the support of the wife and a 15-year-old daughter.[39]

An increase in the income or property of the husband may be made the basis for an upward revision of the alimony decree in favor of the wife. Since the period considered in this report was in the main one of falling prices and reduced incomes, such petitions by the wife were infrequent.[40] It is probable, moreover, that in the long run applications for modifications by the party on whom the burden rests to make the payments will outnumber petitions by the recipient for additional awards, inasmuch as the pressure on the former to seek judicial relief is undeniably greater. Still, the courts will not refuse to entertain applications for increased alimony where they are well founded. For instance, upon proof by the wife that her divorced husband had come into money as beneficiary of a trust estate subsequent to the decree, entitling him to about $5,000 a year, the decree was revised to call for additional payments of $150 a month. That the trustees had not actually paid the amount due and that the trust was a "spendthrift trust," exempting the beneficiary's income from the claims of creditors, did not deter the court from its decision.[41] An increase in the husband's salary from $2,000 to $10,000 a year and a rise in the cost of living have been held to warrant an increase in the monthly payments to the wife from $60 to $150 "to correspond with the social position of her former husband and maintain her in the style and condition that his financial position would reasonably have justified her in maintaining but for his wrongful conduct [which led to the divorce]."[42] In *Faye v. Faye*[43] the court upheld a $900 increase in the annual payments for the support of the wife and child, notwithstanding the husband's financial means had not improved, on the ground that the original allowance had failed to provide for med-

[35] Heard v. Heard, 116 Conn. 632, 166 Atl. 67 (1933), affirming decision of the lower court.
[36] Moore v. Moore, 163 Miss. 15, 140 So. 526 (1932), affirming the lower court's decision.
[37] Robins v. Robins, 106 N. J. Eq. 198, 150 Atl. 340 (1930).
[38] Faye v. Faye, 131 Misc. 388, 226 N. Y. Supp. 729 (1928).
[39] Farlee v. Farlee, 101 N. J. Eq. 111, 137 Atl. 648 (1927).
[40] Only four petitions by the wife for modification of the award on the ground of the husband's increased income are cited by the Fourth Decennial Digest, 1926-1936.
[41] Erickson v. Erickson, 181 Minn. 421, 232 N. W. 793 (1930), affirming decision of the lower court.
[42] Humbird v. Humbird, 42 Idaho 29, 243 Pac. 827 (1926), modifying decision of the lower court.
[43] 131 Misc. 388, 226 N. Y. Supp. 729 (1928).

ical and dental expenses, the child's vacation needs, and repairs to furniture, and that the husband's earning capacity should be considered.

However, much fluctuations in the income of the husband may be grounds for the amendment of the decree, the courts are apparently committed to the rule that his remarriage and its attendant financial burden may not be successfully urged in support of a petition for modification.[44] Voluntary assumption of new family obligations which diminish the husband's ability to comply with the terms of the decree should not, it is thought, avail him in avoiding the duty to support his former wife which is embodied in the alimony order. Furthermore, the father's subsequent marital engagements should not be allowed to jeopardize the maintenance of the children of his first marriage and insofar as there is a conflict between the husband's duties to his first family and to his new family the inclination seems to be to resolve it in favor of the former. The policy is doubtless intended to discourage future marital alliances on the part of those whose financial means are inadequate for the support of both families. In *Neuhangen v. Neuhangen*[45] the court, while refusing to modify the decree at the instance of the husband who alleged his remarriage, attempted to impress him with the gravity of marital obligations and remarked: ". . . he has yet to learn, it would seem, that getting married is serious, and marrying a second time while the bride he first led to the altar, and those born of that marriage, must be supported, is still more serious."

Where there are no children, however, a different attitude may prevail. This is illustrated by the decision in *Lamborn v. Lamborn*[46] wherein the husband applied for a reduction in the payments on the ground he wished to remarry and that his divorced wife could earn money for her support. In upholding a decrease in the alimony from $45 to $30 a month, the court held it was proper to consider the laudable wish of the husband, who had no children, to remarry and that he should not be so crippled in his finances as to preclude the establishment of another home.

Although his remarriage is seldom alleged by the husband as the sole basis for invoking modification of the decree it is very often to be found among the grounds upon which the petition is founded, usually in conjunction with claims of reduced income. This indicates a notion that in spite of rules to the contrary such a circumstance will reflect favorably upon the petitioner's case. Such a notion may often be well founded, for it is arguable that the demands of a man's new family should be preferred to those of a family with whom he has severed all social connections. A failure to give adequate consideration to the husband's new obligations may lead to marital discord and to the break-up of a happily constituted marriage to enable the husband to bear the burden of a former marriage which has already been dissolved. But courts usually are adamant against granting relief where the factors alleged in

[44] Stone v. Stone, 212 Iowa 1344, 235 N. W. 492 (1931); Williams v. Williams, 119 Neb. 8, 226 N. W. 798 (1929); Aiken v. Aiken, 221 Ala. 67, 127 So. 819 (1930); Simpson v. Simpson, 51 Idaho 99, 4 P. (2d) 345 (1931).

[45] 92 Colo. 155, 18 P. (2d) 454 (1934).

[46] 80 Cal. App. 494, 251 Pac. 943 (1927).

support of the petition, exclusive of the remarriage, are insufficient to warrant modification.[47]

Where there are children of the second marriage the tendency would seem to be toward greater leniency, although even here some courts are unmoved. In one case it was held that remarriage of the husband and his obligation to support four stepchildren was not a "change of conditions," although it appeared that a son by the first marriage had already reached his majority and could support his mother.[48] In another, a showing by the petitioning husband that he had remarried and had three new children, that he was afflicted with a heart disease, and that he was to be pensioned off shortly with a material reduction in income did not avail him in obtaining relief.[49] A more realistic approach is taken by some courts, such as that in *Shattuck v. Shattuck*,[50] where a reduction in the alimony payments from $50 to $20 a month was upheld under similar circumstances and it was said to be "the duty of the court to make a fair division of respondent's income between the two families. . . . He has as much duty to, and the court has as much interest in, those children [of the second marriage] as those of the first marriage." Another court held that the new family obligations of a husband who had remarried and had a child were to be considered, in addition to a decrease in his salary, in reducing his monthly alimony payments.[51] Similarly, a court has refused to increase the award upon petition by the wife, although his income had risen, for his financial burdens had mounted on his remarriage and birth of another child, and "his obligations to these had to be met."[52] *Lord v. Lord*[53] intimates that a showing by the husband that the burden of the decree precludes him from furnishing adequate support to his new wife will warrant modification of the decree. In that case a petition alleging remarriage and support of a stepson was held insufficient to entitle the husband to a reduction since it was unaccompanied by a showing of inability to support his present wife suitably.

Attention is now turned from the first variable, the husband's ability to pay, to a consideration of the second major component of the basic alimony equation, the needs of the wife. A substantial change in the requirements of the divorced wife for her support should furnish the basis for a modification of the alimony order. The ability of the wife to earn her own living is a factor which enters into the computation of the original award. Acquisition of earning capacity and actual employment after the decree have been held not to support a decrease in the payments upon application by the husband.[54] On the other hand, in *Lamborn v. Lamborn*[55] it ap-

[47] Williams v. Williams, Aiken v. Aiken, both *supra* note 43. But remarriage of the husband will not preclude him from obtaining a reduction if other facts render modification expedient. Nicolls v. Nicolls, 211 Iowa 1193, 235 N. W. 288 (1931).

[48] Cook v. Cook, 168 Wash. 649, 13 P. (2d) 38 (1932), affirming decision of the lower court.

[49] Morrison v. Morrison, 208 Iowa 1384, 227 N. W. 330 (1929), affirming decision of the lower court.

[50] 141 Wash. 600, 251 Pac. 851 (1927).

[51] Eddy v. Eddy, 264 Mich. 328, 249 N. W. 868 (1933), affirming lower court's decision.

[52] Frank v. Frank, 287 S. W. 829 (Mo. App. 1926), reversing lower court's decision.

[53] 37 N. M. 24, 16 P. (2d) 933 (1933), reversing lower court's decision.

[54] Newburn v. Newburn, 210 Iowa 639, 231 N. W. 389 (1931), reversing lower court's decision.

[55] *Supra* note 45.

peared that the wife, though incapacitated by reason of illness to carry on her professional work as nurse, was able to engage in other types of work and earn a part of her living. Nevertheless, she showed a complete lack of disposition to contribute anything to her own support and the court dwelt at length upon this factor in reducing the monthly sum payable by the husband from $45 to $35. In view of the size of the original amount it is interesting to observe in the opinion the statement that a divorce court in awarding alimony where the husband earns his living by daily labor, "should not do so in a sum inducing idleness on the part of the wife." Similarly, it has been held that proof that the wife was now earning a monthly salary of $146 is sufficient to justify termination of the alimony payments of $250 a month.[56] The opinion fails to disclose what, if any, were the wife's earnings at the time of the decree. For a husband to obtain a modification of the decree without showing a change of condition on his part, he must establish that the wife is now self-supporting.[57]

Physical injuries arising subsequent to the decree which make it impossible for the wife to contribute to her support were considered proper grounds for an alimony increase from $15 to $75 monthly in *Curtiss v. Fisher*.[58] Ill health and medical treatment necessitating extraordinary expenses may also be asserted by the wife in obtaining a revision of the decree,[59] or in successfully preventing a reduction in the payments at the husband's request.[60] Where, in spite of ill health or financial reverses on the part of the wife there has been a corresponding decline in the husband's income it would seem that the "changes" would nullify each other and neither party should be able to obtain a revision.[61] A wife may not, by voluntarily changing her residence to a location where her cost of living is higher, become entitled to additional alimony.[62]

The remarriage of the divorced wife is generally assumed to relieve the alimony-paying husband of the duty of supporting her, inasmuch as assumption of this obligation by the second husband will usually wipe out the need for further payments. The statutes of several jurisdictions make it mandatory upon the court to modify the decree upon the remarriage of the wife, provided, of course, application is made therefor.[63] But in the absence of such statutory provision the courts are not unanimous in the view that this circumstance in itself is a proper basis for termination of the payments. Within recent years two New Jersey courts have differed in their

[56] Ross v. Ross, 1 Cal. (2d) 368, 35 P. (2d) 316 (1934), modifying decision of the lower court.

[57] Foltz v. Foltz, 281 Mich. 179, 274 N. W. 755 (1937).

[58] 186 La. 126, 171 So. 716 (1927), reversing lower court's decision.

[59] Rood v. Rood, 280 Mich. 33, 273 N. W. 337 (1937), affirming lower court's decision. In Kelley v. Kelley, 290 S. W. 624 (Mo. App. 1927), the wife's allegations that she could not work steadily at her employment because of physical inability were regarded with much scepticism by the court, who refused to increase the alimony and remarked that "the plaintiff has exhibited exceptional ability to take care of herself in adverse circumstances."

[60] Molema v. Molema, *supra* note 32.

[61] No case, however, was found involving this situation.

[62] Brassert v. Brassert, 269 Mich. 545, 257 N. W. 879 (1935), affirming lower court's decision.

[63] See 2 VERNIER, AMERICAN FAMILY LAWS, §106.

interpretation of the effect of the wife's remarriage. In *Dietrick v. Dietrick*[64] the court relieved the husband from the duty of making further payments under the decree upon his showing of the remarriage of the wife. It was there held that this event raises a presumption that the necessity for alimony no longer exists, subject to rebuttal on the part of the wife by proof that the second husband is unable to support her in the manner and station of the first husband, which the wife failed to do in that case. On the other hand, in *Cropsey v. Cropsey*,[65] the court refused to modify the decree upon the wife's remarriage and, in contrast to the "presumption" theory above, held the husband had failed to sustain the burden of proving that the wife was not in need of further payment. In another case proof that the wife had married a man of "considerable means" was considered sufficient to discontinue the alimony award.[66] A man may not, however, without the court's sanction, cease the payments when his divorced wife contracts a new marriage, and he will be liable for the unpaid alimony which accrued until the time application is made for termination.[67]

An anomalous situation is presented where the divorced parties have intermarried again. A few jurisdictions provide in their statutes that upon application by both parties and satisfactory proof of their intermarriage, the court "may" annul the orders relating to the payment of alimony.[68] The inference may be drawn therefrom that intermarriage does not *ipso facto* abrogate the duty of the husband to satisfy the terms of the decree. In *Carson v. Carson*,[69] however, it was held that remarriage of the parties to each other annuls the decree and neither party may seek to enforce or modify its terms. Though clearly *obiter*, the court intimates that where the second marriage has been judicially dissolved the provisions of the original alimony decree might be enforced.

The husband cannot escape the duty of supporting his children because his wife has remarried.[70] The divorce decree may make separate allowance for the support of the children, or the provisions for their maintenance may be embodied in the general alimony award granted to the wife. Whichever method is used, the payments for their benefit may be changed for reasons substantially identical to those which obtain in the case of payments for the benefit of the wife. They may be increased where they have become inadequate or the wife has become helpless and unable to contribute to their support, or they may be decreased where the husband's income has fallen, or illness has caused him large expense, or the wife has inherited property on her own account.[71] The husband may likewise be freed from the duty of paying for

[64] 99 N. J. Eq. 711, 134 Atl. 338 (1926).

[65] 104 N. J. Eq. 187, 144 Atl. 621, 64 A. L. R. 1266 (1929).

[66] Shoop v. Shoop, 58 S. D. 593, 237 N. W. 904 (1931).

[67] Niedt v. Niedt, 95 S. W. (2d) 868 (Mo. 1936). Conceivably, much of the difficulty concerning revision upon the wife's remarriage may be circumvented by provision in the decree for continuation of the payments while the wife remains single. North v. North, 100 S. W. (2d) 582 (Mo. 1937).

[68] 2 VERNIER, AMERICAN FAMILY LAWS, §106.

[69] 143 Okl. 274, 288 Pac. 475 (1930).

[70] Cord v. Cord, 217 Iowa 812, 253 N. W. 125 (1934); Woodall v. Woodall, 204 Iowa 423, 214 N. W. 483 (1927).

[71] Kennard v. Kennard, 179 So. 660 (Fla. 1938).

their support when he shows they have become of age, or are self-supporting.[72] It has been held, however, that unless an amount is separately awarded to the children, the decree awarding alimony should not be treated as conferring a separate award and subsequent removal of the children from the mother's custody may be ground for a diminution in the payments, but is not necessarily so.[73] Marriage of a daughter, one of three children in the custody of the wife, has entitled the husband to a reduction in the award from $77 a week to $250 a month.[74]

The decision in the case of *Fisher v. Fisher*[75] indicates a judicial reluctance to shift the burden of supporting the wife from the divorced husband to the children when the latter have grown up and are capable of earning income. Although it was shown that the children were substantially contributing to the support of their mother, the court refused to terminate the payments and held the circumstances alleged could not relieve the husband of his responsibilities.

Immoral conduct on the part of the wife subsequent to the decree is sometimes asserted by the husband as a basis for discontinuance of his alimony obligations. The moral quality of the post-divorce behavior as a factor of pertinence in modification cases stands in a category *sui generis* and bears no relation to the basic alimony equation to which allusion has been made. Divorce decrees, particularly in England, sometimes contain a provision for payment of alimony to the wife *dum casta vixerit*, which frees the husband from the duty of contributing to the wife's support when she has been guilty of unchastity and, in some instances, other moral derelictions.[76] In the absence of such a provision, it is arguable that a wife who has been granted a divorce *a mensa et thoro* is under a duty to her husband to abstain from the type of conduct which would ordinarily enable him to secure a divorce of his own right. Failure to observe this duty should properly justify termination of the alimony payments, and it was so held in *Gloth v. Gloth*.[77] The argument is hardly applicable to cases of absolute divorce, where the marriage relation has been completely severed and the ordinary duties attendant upon that relation have ceased to exist, except insofar as the husband's obligation to furnish support is incorporated in the requirement to pay alimony. In such a case it is held that the wife, after the divorce, owes to the husband no greater duty to lead a pure and virtuous life than she owes to society generally, and proof that she has had illicit relations with men should not avail the husband in obtaining a modification of the decree.[78] But in *Lindbloom v. Lindbloom* the court said that the wife's misconduct is a factor properly to be considered in reducing the alimony award.[79] A recital in the decree that the wife recover per-

[72] Loomis v. Loomis, 273 Mich. 7, 262 N. W. 331 (1935); Smith v. Smith, 148 Atl. 900 (R. I. 1930); Brassert v. Brassert, *supra* note 61.

[73] Rochelle v. Rochelle, 235 Ala. 526, 179 So. 825 (1938).

[74] Conklin v. Conklin, 299 N. Y. Supp. 306 (1937).

[75] 237 Ky. 823, 36 S. W. (2d) 635 (1931), reversing lower court's decision.

[76] See 45 L. R. A. (N. S.) 880; (1913) Ann. Cas. 1914D 597.

[77] Gloth v. Gloth, 154 Va. 511, 153 S. E. 879, 71 A. L. R. 700 (1930), affirming lower court's decision.

[78] Cooley v. Cooley, 244 Ill. App. 488 (1928); Smith v. Johnson, 321 Ill. 134, 151 N. E. 550 (1926).

[79] 180 Minn. 33, 230 N. W. 117 (1930), affirming lower court's decision.

manent alimony "so long as she remains single and *demeans herself in a proper manner*" has been held to be observed although she had consorted with men in noisy parties and partaken of intoxicating liquors. The decree, said the court, did not require her "to emulate St. Simeon Stylites if [she] wanted [her] alimony to continue."[80]

The courts apparently look with disfavor upon agreements between the parties subsequent to the decree which purport to adjust the payments to changes in their circumstances. Behind this attitude is the fear that justice would often be thwarted by ignorance, undue influence, or deceit, and also stands the perennial judicial precaution against any individual action which will tend to oust the courts of their inherent jurisdiction to determine controversies and adjudicate the rights of the parties. In one case the court failed to uphold an agreement of the parties reducing the amount of the alimony allowance from $125 to $45 a month upon marriage of a daughter.[81] It was suggested such a contract was against public policy and that it could neither supersede the original decree nor oust the court of its power to modify it. In another, the husband asked the court to vacate the order for payment, on the basis of a settlement entered into between the parties after the decree, and relief was denied on the ground that the wife had not been afforded the protection of the court in an inquiry as to the fairness, reasonableness, and adequacy of the settlement.[82] In the absence of a holding that the contract is opposed to public policy it is likely that courts will promptly seize upon another factor which will justify cancellation of the contract. Evidence, admittedly meager, that the wife was ill and in an overwrought condition at the time the agreement was made modifying the terms of the alimony, has been held sufficient to nullify the contract, and the wife was permitted to recover the sum provided in the decree, less the amount received under the settlement.[83]

An analysis of the cases reveals a dearth of substantive rules that bind the courts in revising the alimony provisions of a divorce decree. It is evident that the question is not susceptible of determination by the application of rigid formulae. Even where the issues hinge on the increase or decrease of the income of the parties it is not possible to forecast the result by the use of simple rules of mathematics. In altering a decree the courts exercise independent judgment on the proper relation that the factors of income and property should bear to the size of the award, and the cases examined reveal that even where there has been a measurable change in the economic status of the parties, the amendment of the decree is not directly proportional to it. The courts have to deal with an almost innumerable variety of factors which may bear on the propriety of the change or the continued enforcement of the decree. Conditions on the one side must be weighed against conditions on the other and a neat balance struck which will represent an equitable compromise of conflicting interests. In view of the latitude of circumstances that must be considered, which make it

[80] Blakely v. Blakely, 216 Ky. 318, 87 S. W. (2d) 628 (1935).
[81] Capell v. Capell, 164 Va. 45, 178 S. E. 894 (1935).
[82] Dreir v. Dreir, 101 N. J. Eq. 342, 139 Atl. 235 (1927).
[83] Hamlin v. Hamlin, 224 App. Div. 168, 230 N. Y. Supp. 51 (1928).

possible to differentiate every case on its facts, no more than a general categorization of the pertinent factors could be attempted. The necessity of flexibility in alimony decrees is imperative and the exercise of a wise discretion on the part of the trial judge, properly checked by recourse to appellate review, can probably do more to insure substantial justice in this field than any code of rules designed to direct the determination of these issues. However, it would not be prudent to overlook the consequences of a policy which would favor revision of an order upon each fluctuating change in the condition of the parties, regardless of decree. Aside from its encouragement of multiple and repeated invocations of judicial relief, it would introduce an element of uncertainty in the post-divorce relations of the parties which might seriously hamper the effective enforcement of the courts' decrees. A certain degree of permanence in the maintenance of the original award is therefore desirable. Where the alimony has become "a club of revenge and hate in the hands of the one, or a millstone about the neck of the other,"[84] or where its enforcement would be attended by "positive wrong and injustice,"[85] the necessity of modification is imminent.

Much agitation for the alteration of a decree could be avoided by the framing of the original award with a view to reasonable and ordinary changes that may likely occur in the relations of the parties. Where factors which are reasonably certain to affect the circumstances of the parties can be anticipated, allowance therefor in the decree would preserve its essential soundness in the face of these changes. For instance, where there are no children and the parties are young, the possibility, probability and desirability of allowing the husband to remarry could well be considered, and future application by him for reduced payments might thereby be avoided.[86] Or where the divorced wife is pregnant, allowance for the child to be born will prevent her from applying for additional payments for this support.[87] The effect of the increasing age of the parties on the fundamental factors of ability and needs is usually considered in determining the original amount of alimony, and "age" is therefore not regarded as a change in circumstances.[88]

The exercise of a "wise discretion" on the part of the trial judge is rendered difficult by the limitations on his ability to make a full and adequate investigation into all the circumstances affecting the parties. Reliance on their testimony, which is often conflicting, incomplete, and inaccurate, and the pressure of a crowded docket which places a premium upon time may often lead to ill-advised decisions. The creation of domestic relations courts and the extension of their powers to include matters of divorce and alimony would induce a degree of specialization that would promote efficiency and justice in the determination of such cases. Such a system, moreover, would contemplate the preservation and exposition of the evidence relied upon in

[84] Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063 (1917).
[85] Metzger v. Metzger, 278 N. W. 187 (Iowa, 1938).
[86] Lamborn v. Lamborn, *supra* note 45.
[87] Kiger v. Kiger, 205 Iowa 1200, 219 N. W. 314 (1928).
[88] McNary v. McNary, 206 Iowa 942, 221 N. W. 580 (1928).

making the alimony award and greatly facilitate the handling of future controversies between the parties. Appointment of an official *amicus curiae*[89] offers the advantages of an impartial investigation into all relevant factors and a removal of most of the difficulties encountered in securing adequate evidence. Exclusive reliance by the court on the testimony of the investigator, however, is to be avoided as entailing the perils inherent in any inquisitorial system where the parties are not given a full opportunity to be heard. The most desirable method would probably lie in permitting their testimony to be supplemented and confirmed by the investigator. The essential objective is the creation and maintenance of conditions which will permit the courts to operate with full knowledge of the facts. Once these are available, determination of the issues should be left largely to discretion, tempered by experience and a proper application of fundamental legal concepts.

[89] For a description of the work of the Friend of the Court in Detroit with regard to alimony proceedings, see Pokorny, *Practical Problems in the Enforcement of Alimony Decrees, infra* p. 274.

THE ENFORCEMENT OF FOREIGN DECREES FOR ALIMONY

ALBERT C. JACOBS*

In a court of competent jurisdiction of a state in which a husband and wife are resident, the wife successfully sues the husband for a divorce or separation and alimony. The decree awards her alimony for the support of herself and children, if there be any, either in the form of a lump sum or installment payments. To avoid the sanction of this court, the husband, leaving no appreciable assets behind him, flees to a second state. The wife, in dire need, and no longer possessing an effective remedy in the state where the divorce was granted, attempts in the second state to enforce the decree providing for support. Or the wife, having obtained a decree for divorce or separation and alimony in a state where she was then resident, returns to the state of her former residence and seeks to obtain payments under that decree.

These patterns are typical; the cases presenting questions as to the enforcement of foreign[1] decrees of alimony very generally follow one of these fact situations. For convenience of reference, in the discussion which follows husband and wife will be designated by the symbols *H* and *W*, respectively. The state which is the forum of the divorce action wherein alimony is awarded will be designated as *F-1;* the second state, the forum of the suit brought on the alimony decree, as *F-2*.

What remedies are available to *W* in *F-2*? Must the courts thereof give "full faith and credit" to the alimony decree of the *F-1* tribunal? If so, what does this mean? Is it material whether the *F-1* decree is for permanent or temporary alimony, whether it provides for a lump sum or for installment payments, whether it is subject to modification by the *F-1* court? Can *W* sue in *F-2* for the lump sum or for the payments which have accrued and are in arrears? Can she do anything to secure the payment of the future installments as they come due? What is the nature of her remedy in *F-2*? Must she sue at law, relying upon the attendant legal execution, or can she proceed in equity? If equitable relief is open to her in *F-2*, is she entitled to the remedies which would have been available to her had she obtained a local alimony

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[1] The term "foreign" is applied, as the antonym of "domestic," to sister states of the United States as well as to foreign nations.

decree there? Or can she take advantage of the remedies which would have been open to her in *F-1*?

The problem of the remedies available for the enforcement in *F-2* of a decree for alimony rendered in *F-1* has become increasingly important. Divorce rates have risen to such an extent in recent years that they have become the highest in our history. 218,000 decrees were issued in 1935, probably more in the succeeding years.[2] When a husband has been ordered to pay money for the support of a woman no longer his wife or from whom he is legally separated, it is not at all strange that he should indicate an inclination not to comply with the decree. The arranged, the friendly divorce, it is true, is typical of our times.[3] In the amicable divorce or separation economic matters are generally arranged out of court. It is in the real contest, where parties are not on friendly terms, that most alimony awards are made.[4] With the evolution of faster and more accessible means of transportation, with the development of the automobile, the streamliner and the airliner, husbands against whom alimony decrees have been rendered in *F-1* find flight from the state to escape the enforcement thereof more and more easy. Problems of real social import are thereby raised. It is just as much a need of society and justice that alimony be paid in *F-2* as it was in *F-1*.[5]

The law concerning the enforcement of a foreign alimony judgment is still in an evolutionary stage. At one time there was considerable hesitation as to the extraterritorial effect of an *F-1* alimony decree.[6] In *Battey, Executor v. Holbrook*,[7] it was said by way of *dicta*, that "upon a decree for alimony, it may be well to remark by way of caution, we suppose no action will lie in another jurisdiction."

A decree for alimony is an order of a competent court, usually incidental to a suit for a divorce *a vinculo* or *a mensa et thoro*, ordering the husband to pay a certain amount, either in a lump sum or periodically for the support of the wife and children, if there be any.[8] It is generally an obligation of the same nature as the marital duty to support. Thus it is an obligation in the enforcement of which the state has a paramount public interest—the wife and children must not become public charges and derelicts. For this reason there attaches to an alimony decree a public policy in securing to the wife the performance of this duty to support. The remedies for enforcement are more effective than those available in the case of an ordinary law

[2] The last report of the United States Department of Commerce, Bureau of Census, on Marriage and Divorce, was issued in 1934 and covered the year 1932. For subsequent statistics, see Stouffer and Spencer, *Marriage and Divorce in Recent Years* (Nov. 1936) ANNALS, 56-69.

[3] *Collusive and Consent Divorce and the New York Anomaly* (1936) 36 COL. L. REV. 1121; Jacobs, *Attack on Decrees of Divorce* (1936) 36 MICH. L. REV. 749; Sayre, *Divorce by Judicial Consent* (1933) 18 IOWA L. REV. 493.

[4] According to CAHEN, STATISTICAL ANALYSIS OF AMERICAN DIVORCE (1932), nine per cent of the divorce petitions now request alimony, and it is granted in six per cent.

[5] See Ostrander v. Ostrander, 190 Minn. 547, 550, 252 N. W. 449 (1934).

[6] See Barber v. Barber, 2 Pin. 297, 1 Chand. 280 (Wis. 1849); Battey, Ex'r. v. Holbrook, 11 Gray 212, 213 (Mass. 1858).

[7] *Supra* note 6.

[8] See 2 VERNIER, AMERICAN FAMILY LAWS (1932) 259-325, 451-462; Munson, *Some Aspects of the Nature of Permanent Alimony* (1916) 16 COL. L. REV. 217.

judgment or money decree.[9] A local alimony order is generally accorded the full scope of equitable enforcement. In addition to the ordinary means available for the collection of money judgments, the injunction,[10] sequestration of the husband's property,[11] receivership,[12] the writ of *ne exeat,*[13] and contempt proceedings[14] are often open to the wife. In other ways as well, because of the public import involved, the law has given special protection to an alimony judgment. It survives the bankruptcy of the husband,[15] it generally prevails over the exemption laws;[16] by the weight of authority it is exempt from garnishment, except for debts contracted for necessaries subsequent to the divorce;[17] imprisonment for failure to pay alimony does not violate the constitutional provisions against imprisonment for debt.[18] These will suffice to illustrate the important point that a decree for alimony is *sui generis.*

In the discussion which follows it will be assumed that the *F-1* court rendering the alimony judgment has jurisdiction over the subject matter and personal jurisdiction over the parties.[19] It will further be assumed that the divorce or judicial separation, where such is involved, is one which will be recognized in *F-2* either under the full faith and credit clause, on the ground of comity, or because of estoppel or some analogous principle.[20]

The Constitution of the United States[21] and the statutes enacted thereunder[22] enjoin the courts of the several states to give "full faith and credit" to the judicial proceedings of every other state. It is elementary that this calls for more than the

[9] The statutory material on enforcement and security provisions is collected in 2 VERNIER, AMERICAN FAMILY LAWS 290-303. See MASS. GEN. LAWS (1932) c. 208, §§12-14, 25, 36; MICH. COMP. LAWS (1929) §§12742, 12743, 12747, 12770, 12780, 13910; N. Y. CIV. PRAC. ACT. §§1171, 1171a, 1172.

[10] *In re* White, 113 Cal. 282, 45 Pac. 323 (1896).

[11] Castell v. Castell, 38 Ark. 477 (1882); Swallow v. Swallow, 84 N. J. Eq. 109, 92 Atl. 872 (1915).

[12] Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469 (1907).

[13] Boucicault v. Boucicault, 21 Hun. 431 (N. Y. 1880).

[14] Foster v. Foster, 130 Mass. 189 (1880).

[15] 11 U. S. C. §35; Audubon v. Shufeldt, 181 U. S. 575 (1901).

[16] Szymanski v. Szymanski, 188 Iowa 931, 176 N. W. 806 (1920); Fowler v. Fowler, 61 Okla. 280, 161 Pac. 227 (1918).

[17] See Harper, *Garnishment for Alimony* (1928) 13 IOWA L. REV. 164.

[18] Bushman v. Bushman, 157 Md. 166, 145 Atl. 488 (1929).

[19] 2 BEALE, CONFLICT OF LAWS (1935) 1435-1436: "Since this decree (for alimony) is in its effect a mere decree for the payment of money by the respondent, it is clearly a decree *in personam* and not *in rem* and in order to support it there must therefore be personal jurisdiction over the respondent. If, as often happens, the respondent in the divorce case is served only by publication, being a non-resident, it is not possible to render a valid decree against him for alimony.

"When, however, the respondent is before the court for any reason, the court, having personal jurisdiction over him, may render a decree. This happens if the respondent appears either in the original action or in a later proceeding to dispute the allowance of alimony; if he is served with process either originally; or before the alimony is decreed; if he is a respondent in a successful cross libel and therefore came into court with the original complaint; or if he is domiciled within the state and is required in accordance with the law of the state to come into court."

[20] See Jacobs, *supra* note 3.

[21] Art. IV, §1: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

[22] 28 U. S. C. §688: "And the said records and judicial proceedings, so authenticated, shall have such full faith and credit given to them, in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

mere recognition of the *F-1* judicial proceedings. The judgment is to be enforced; it must be made effective so that execution can issue thereon in *F-2*. Just a hundred years ago the Supreme Court of the United States said:[23]

"By the law of the 26th day of May, 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws permit."

A foreign judgment for a sum of money is a debt of record upon which an action can be maintained. It is not enforceable simply by issuing execution thereon or by any other remedy available to judgment creditors.[24]

"No action will lie," however, "in another state on a judgment which is not final and conclusive in a state where it was rendered."[25]

This is fundamental and underlies the law dealing with the extraterritorial enforcement of money judgments. In the case of *Pennington v. Gibson*,[26] Mr. Justice Daniel said:

"We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount and nothing more. . . ."[27]

At one time there was considerable doubt about this proposition.[28] But it is now fundamental that if the *F-1* decree is final and conclusive, be it legal or equitable, an action can be maintained thereon in *F-2*.[29]

So much for money judgments in general. A decree for alimony, whether calling for a lump sum or periodic payments, is generally not subject to alteration in the absence of express power to the contrary reserved in the decree itself or provided for by express statute.[30] An alimony judgment not subject to modification would seem

[23] M'Elmoyle v. Cohen, 13 Pet. 312, 325 (U. S. 1839) *per* Wayne, J.

[24] RESTATEMENT, CONFLICT OF LAWS (1934) §433.

Rohden v. Rohden, 119 Misc. 624, 625, 198 N. Y. Supp. 16 (1922): "Judgments and orders of other states have no extraterritorial force as mandates." *Per* McAvoy, J. Accord: Hardy v. Hardy, 136 Misc. 759, 240 N. Y. Supp. 826 (1930).

[25] 2 BEALE, CONFLICT OF LAWS 1390. See also RESTATEMENT, CONFLICT OF LAWS (1934) §§434, 435. §435: "A valid foreign judgment for the payment of money which by the law of the state in which it was rendered is not a final judicial determination of the right to payment will not be enforced."

[26] 16 How. 65, 77 (U. S. 1853).

[27] See Wagner v. Wagner, 26 R. I. 27, 28, 57 Atl. 1058 (1904).

[28] See Barber v. Barber, *supra* note 6.

[29] See 2 BEALE, CONFLICT OF LAWS 1381; RESTATEMENT, CONFLICT OF LAWS (1934) §434, comment *c*.

[30] Mayer v. Mayer, 154 Mich. 386, 390, 117 N. W. 890 (1908): "We think the authorities generally sustain the proposition that a decree for alimony in a divorce *a vinculo* made without reserve, although payable in installments, is final and cannot be challenged after enrollment of the decree."

2 VERNIER, AMERICAN FAMILY LAWS 274-275: "If alimony in absolute divorce is a substitute for the wife's right to support by her husband, it would seem that it should be subject to change according to changes in the needs of the wife or in the ability and proper obligations of the husband, just as the right to support would change if the marriage had continued. This seems to be the rule of the ecclesiastical courts in limited divorce cases, and of the courts of a few American jurisdictions in cases of absolute

to have the finality of an ordinary money judgment. It is common practice, however, for courts to reserve in the decree the power to vary, modify or annul it, and statutes conferring such power exist in many states.[31] Such being the case, has the alimony decree that final and conclusive character upon which enforcement in *F-2* is conditioned? Does it fall within the pattern providing for the enforcement of money judgments?

Where the decree of *F-1* calls for the payment of alimony in a lump sum, and there is no power statutory or otherwise to annul, vary or modify it, we are, it seems, dealing with something like an ordinary money judgment. This situation presents no difficulty so far as legal enforcement in *F-2* is concerned. And, as would be expected, courts have given full faith and credit to such a decree.[32]

If *F-1* has no statute authorizing modification or annulment and the court has reserved no such power unto itself, a decree calling for periodic payments would seem to be final and conclusive, at least as to the accrued and unpaid installments. They would seem to constitute a debt, and since not subject to modification or cancellation, would be final and conclusive and entitled to recognition in *F-2*. But suppose that by statute or express reservation in the decree the court has the power to vary, modify or annul? Is it material whether this power extends to accrued and unpaid installments or merely to those not yet due? To answer these questions it is necessary to turn to an analysis of the leading cases.

The famous case of *Barber v. Barber*,[33] in the Supreme Court of the United States, is the starting point of all discussion in this field. In 1847, the Court of Chancery of New York had granted Huldah Parker a divorce *a mensa et thoro* from her husband and had directed the latter to pay her alimony in quarterly installments. Although the separation was decreed to be forever, the power to modify was reserved by a provision that the parties might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged. It was provided that the unpaid installments of alimony should bear interest "and that execution might issue therefor *toties quoties*." The husband failed to pay any of the alimony and

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divorce. The prevailing rule in our civil courts appears to be that the court cannot alter the decree after it has been made, unless power to do so was reserved therein or unless there is statutory authority to do so. Nevertheless, it is submitted that such authority should not be necessary. The majority rule seems to proceed upon the theory that the decree is res judicata as to alimony. Admittedly this is correct as to the state of facts existing when the decree was made."

[31] 2 VERNIER, AMERICAN FAMILY LAWS 275, points out that such statutes exist in 31 of the 51 American jurisdictions. See CAL. CIV. CODE (Deering, 1937), §139; MASS. GEN. LAWS (1932), c. 208, §37; N. Y. CIV. PRAC. ACT, §§1155, 1159, 1170.

[32] Dow v. Blake, 148 Ill. 76, 87, 35 N. E. 761 (1893): The plaintiff wife successfully maintained an action of debt upon a judgment in her favor in Wisconsin for $31,000 as alimony. "We see no reason why a final decree, which directs the payment of a specific sum of money, should not have the same force and effect as a judgment at law; and it has not been shown that it does not have such force and effect in the State of Wisconsin. Where such a final decree is rendered by a court of competent jurisdiction in one State, the Constitution of the United States requires that full faith and credit be given to it in every other State. It makes no difference, so far as the duty of the courts in another State to enforce it is concerned, that the specific sum required to be paid by such a final decree is for alimony."

See also 2 BEALE, CONFLICT OF LAWS 1392.

[33] 21 How. 582 (U. S. 1858).

removed to Wisconsin where he procured an *ex parte* absolute divorce.[34] Subsequently an action was brought by Mrs. Barber upon the common law side of the Federal District Court in Wisconsin to recover the arrears of alimony.[35] Relief was denied, however, "for the reason that the remedy for the recovery of alimony was in the court of chancery and not at law."[36] A suit to recover the overdue alimony was then commenced by the wife's next friend on the equity side of the court. The defendant husband demurred on the ground of lack of jurisdiction of the court of equity in that the plaintiff wife could not acquire a domicil separate and apart from his, since the marriage status was not dissolved by a judicial separation, and there was, therefore, no diversity of citizenship; that relief could only be had in the Court of Chancery of New York; and that it did not appear that the wife had exhausted her remedies in New York. The demurrer was overruled and the defendant then answered admitting the New York decree and not raising any question as to its finality.[37] From a decree for the plaintiff, the defendant appealed to the Supreme Court of the United States. The issue was thus stated by Mr. Justice Wayne:

"Whether a wife divorced a mensa et thoro can acquire another domiciliation in a state of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equitable jurisdiction, to recover from him alimony due, and which he refuses to make any arrangement to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case."[38]

The court devoting the greater part of its opinion to the resolution of the real issue in the case—whether the wife could set up a domicil separate and apart from her husband's—concluded that the wife was entitled to sue. No point was made by counsel as to the effect of the New York alimony decree.[39] The court, however, dealt with this situation:

"The decree . . . is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried to judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction."[40]

[34] "It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the vinculum of the marriage." 21 How. 582, 588 (U. S. 1858), *per* Wayne, J.

[35] Barber v. Barber, *supra* note 6.

[36] The husband had demurred on the ground that the wife's remedy was in equity. The sustaining of the demurrer was affirmed. "The decree for alimony is a specific one for the support of the wife, and in its nature distinct and temporary. It may be increased as the necessities of the case may require, and the ability of the husband permit, or it may be diminished or dissolved. Hence it cannot be regarded as a decree absolute for the payment of a sum certain, nor has it the force and effect of a judgment at law. It belongs to that numerous class of decrees which, from their very nature, cannot be enforced in any other than a court of chancery, where one exists." *Per* Larrabee, J., Barber v. Barber, 2 Pin. at 300, 1 Chand. at 284 (Wis. 1849).

See also dicta to the same effect in Battey, Ex'r v. Holbrook, *supra* note 6.

[37] The husband claimed that by the Wisconsin divorce his wife became a *feme sole*, and could not sue by her next friend, and that her remedy was in a court of law.

[38] 21 How. 582, 584 (U. S. 1858).

[39] It did not appear whether the New York court had power to modify the decree as to accrued installments.

[40] 21 How. 582, 591 (U. S. 1858), *per* Wayne, J.

Mr. Justice Wayne continued:

"When that has been done, it becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him, wherever he may be found or where he shall have acquired a new domicil, for the purpose of recovering the alimony due to her, or to carry the decree into judgment there with the same effect that it has in the state in which the decree was given. Alimony decreed to a wife in a divorce of separation from bed and board, is as much a debt of record, until the decree has been recalled, as any other judgment for money is."[41]

Due to the way in which the matter was presented and in which the issues were formulated, these statements were undoubtedly mere *dicta*. The decision was that the trial court did not err in giving effect to the New York decree. But by implication the court indicated that an *F-1* alimony decree, payable in installments, is a debt of record[42] and as such is entitled to full faith and credit in *F-2*, until the decree is recalled, even though it is subject to recall. As to the accrued installments it must be enforced in *F-2*.[43]

The statements of the Supreme Court were followed in the cases which arose. They were stated over and over again, becoming law in the state courts without qualification.[44]

Then came another decision of the Supreme Court of the United States—the much discussed and oft-misunderstood case of *Lynde v. Lynde*.[45] The plaintiff wife sued in New York to enforce a claim for alimony which had been obtained against the defendant husband in a court of chancery in New Jersey. The New Jersey decree adjudged that the plaintiff recover the sum of $7,840 as back alimony [the amount decreed to be due and payable], counsel fees of $1,000; and that the defendant pay permanent alimony of $80 a week from the date of the decree, authorizing the issue of execution therefor, declaring these sums to be liens upon the defendant's real

[41] 21 How. 582, 595 (U. S. 1858).

[42] The phrase "debt of record" originated at an early date to enable a person who had been awarded a money equity decree to institute an action at law. Post v. Neafie, 3 Caines 22 (N. Y. 1805). See Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV. 106, 240; Barbour, *The Extra-Territorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527. The expression was adopted for its convenience in signifying that a final decree was such a judgment as would be capable of supporting an action of debt. See (1937) 85 U. OF PA. L. REV. 726, 728; Pennington v. Gibson, *supra* note 23; McElroy v. McElroy, 208 Mass. 458, 464, 94 N. E. 696, 699 (1911).

[43] See, however, the dissent of Daniel, J.: "This allowance is not in the nature of an absolute debt. It is not unconditional, but always dependent upon the personal merits and conduct of the wife—merits and conduct which must exist and continue, in order to constitute a valid claim to such an allowance. This allowance might unquestionably be forfeited upon proof of criminality or misconduct of the wife, who could not be permitted to enforce the payment of that to which it should be shown she had lost all just claim; and this inhibition, it is presumed, might embrace as well a portion of that allowance at any time in arrears, as its demand in future." 21 How. 582, 603 (U. S. 1858).

[44] Dow v. Blake, 148 Ill. 76, 35 N. E. 761 (1893); Allen v. Allen, 100 Mass. 373 (1868); Brisbane v. Dodson, 50 Mo. App. 170 (1892); Bullock v. Bullock, 57 N. J. L. 508, 31 Atl. 1024 (1895); Anonymous, 12 Abb. N. C. 160 (N. Y. 1800); Wood v. Wood, 7 Misc. 579, 28 N. Y. C. 154 (1894); Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125 (1900).

[45] Lynde v. Lynde, 181 U. S. 183 (1901).

estate, requiring him to give security for the payment of such sums, and providing for sequestration and receivership in case of the defendant's failure to make the prescribed payments or to furnish the prescribed security.

The Supreme Court of New York decreed that the plaintiff was entitled to a judgment against the defendant, first, for the amount of alimony, counsel fee and costs due or incurred under the New Jersey decree; second, for the amount of alimony accrued since the date of the New Jersey decree; third, that he pay to her $80 a week from the date of the decision, as and for permanent alimony; and lastly, that he give a bond in the sum of $100,000, to secure the payment of the several sums specified and that, upon his failure to comply with the provisions of the decision, a receiver might be appointed by the Court of Chancery of New Jersey.

The Appellate Division,[46] upon the defendant's appeal, modified the judgment, so that the plaintiff recovered of the defendant the sum of $8,840, representing the amount of back alimony awarded by the New Jersey decree plus the $1,000 counsel fee. Both parties thereupon appealed to the Court of Appeals which unanimously affirmed the judgment as above modified.[47] In the words of Gray, J.:

"As a debt of record against the defendant the courts of this state should give it full credit and effect; but as to its other provisions for future alimony and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the Federal Constitution. I do not think that the courts of this state should give effect to the decree by enforcing any of the collateral remedies, which the prevailing party may be entitled to in New Jersey and which the subsequent order gave to her.

"So far as it made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character. The chancellor's action was not final on the subject. . . . The provision of the Federal Constitution, which requires that full faith and credit shall be given to the judicial proceedings of another state, in my opinion, should be deemed to relate to judgments, or decrees, which are not only conclusive in the jurisdiction where rendered, but which are final in their nature. If they, once and for all, establish a debt, or other obligation, against a party, the record is available in other jurisdictions as a foundation for a judgment there."[48]

In the Supreme Court of the United States, in an opinion notable for its brevity, the decision of the Court of Appeals was affirmed.[49] Mr. Justice Gray said:

"The decree for the payment of $8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on the local statutes and practice of the State, and involved no Federal question."[50]

[46] Lynde v. Lynde, 41 App. Div. 280, 58 N. Y. Supp. 567 (1899).
[47] Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979 (1900).
[48] *Id.* at 417-418, 56 N. E. 979.
[49] Lynde v. Lynde, 181 U. S. 183 (1901). [50] *Id.* at 187.

It is worthy of note that the Supreme Court did not cite nor refer to *Barber v. Barber*.[51] A limitation, however, was placed upon that case. Where the *F-1* alimony decree was subject to alteration, modification or annulment, it was not final, and, therefore, not within the full faith and credit clause. In such a situation the wife should first have obtained a decree from the *F-1* court adjudging the installments accrued and unpaid. On such a decree suit should then be brought in *F-2*.[52]

The state courts were thrown into confusion as to the effect of this case upon the statements of Mr. Justice Wayne in *Barber v. Barber*. Some tribunals clearly took the position that *Barber v. Barber*, at least in so far as it was inconsistent with *Lynde v. Lynde*, was overruled by the latter decision.[53] If the installments were subject to alteration or annulment, only the sums due and owing at the time of the *F-1* decree were entitled to full faith and credit. This was so even though there had been no alteration of the installments which had accrued since the *F-1* decree. Other courts held that the burden was on the plaintiff in *F-2* to allege and prove the finality of the *F-1* decree.[54] In *Hunt v. Monroe*,[55] the court said: "It seems to us the safer rule is to require proof of the laws of a sister state in this regard." Some courts, in spite of the *Lynde* case, assumed in the absence of express proof to the contrary that the *F-1* decree was final in regard to accrued and unpaid installments. In *Wagner v. Wagner*,[56] the court stated:

"The objection that an allowance is subject to alteration by the court ordering it, and so it cannot be regarded as a final and conclusive judgment, has little, if any, weight as to an

[51] *Supra* note 33.

[52] See Levine v. Levine, 95 Ore. 94, 101-102, 187 Pac. 609 (1919).

[53] Israel v. Israel, 148 Fed. 576 (C. C. A. 3rd, 1906): In a New York divorce action the husband had been ordered to pay the wife $30 a week for the support of herself and children until the further order of the court, and $223.85 as costs. In an action of assumpsit brought by the wife in the District Court of Pennsylvania, judgment was given which included $2,130 representing alimony and maintenance for 71 weeks, of which sum $120, or alimony for four weeks, was payable on the rendition of the New York decree. The balance had accrued thereafter. "It appears that under the statutes of New York the judgment or decree, so far as it directed the payment of alimony and maintenance not then accrued or payable could at any time thereafter be annulled, varied or modified by the court rendering it. It, therefore, was not a conclusive and final judgment or decree with respect to the sum of $2,010, representing alimony and maintenance for sixty-seven weeks accruing after its rendition. It did not constitute a fixed, unconditional and absolute liability for its payment." *Per* Bradford, J., pp. 577-578. It was held that if the plaintiff remitted the excess over $120 and costs, the judgment would be affirmed.

See also Freund v. Freund, 71 N. J. Eq. 524, 63 Atl. 756 (1906): "This decision [Lynde v. Lynde] controls the earlier decision of Barber v. Barber, . . . and overrules it, if it be inconsistent." *Aff'd without opinion*, 72 N. J. Eq. 943, 73 Atl. 1117 (1906).

Valiquet v. Valiquet, 177 Fed. 994, 996 (C. C. D. N. J. 1909): "The bill shows that all of the alimony which had accrued, according to the decree, has been paid. As to the alimony thereafter and from time to time made payable, the decree was not a final judgment for a fixed sum." *Per* Cross, J.

See also Bleuer v. Bleuer, 27 Okla. 25, 110 Pac. 736 (1910); compare Campbell v. Campbell, 28 Okla. 838, 115 Pac. 1111 (1911).

[54] Page v. Page, 189 Mass. 85, 91, 75 N. E. 92 (1905): "In order to bring herself within the provision the plaintiff must show that the decree (of Maine court awarding $6 week) was final. The decree had reference simply to future payments, and generally a decree in the form of this one is subject to modification by the court which passed it."

[55] 32 Utah 428, 436, 91 Pac. 269, 272 (1907). The plaintiff had not alleged that the Colorado decree was final nor had she set forth Colorado statutes or decisions to that effect. Judgment for the plaintiff was reversed.

[56] 26 R. I. 27, 29, 57 Atl. 1058 (1904), *per* Stiness, C. J.

amount already due at the time of suit. An accrued amount would not be changed by the court if the debtor was able to pay it, and a suit on a decree is but a step to enforce such payment."

The decision to a large extent was placed upon the grounds of public policy.[57] The needs of the wife are the same whether she sues in *F-1* or *F-2*. Other courts took the same position.[58]

Thus, as the result of the *Lynde* case the effectiveness of the wife's remedy in *F-2* was curtailed materially. As a practical matter, in but few cases did the court decide that alimony was due and owing at the time of the *F-1* decree. And again, most decrees calling for future payments were, as they should be, subject to modification at the hands of the *F-1* tribunal.

A few years later the Supreme Court of the United States again had occasion to deal with the matter, this time in the case of *Sistare v. Sistare*.[59] In 1899 a New York court had granted the plaintiff wife a separation from bed and board and had ordered the defendant husband to pay her weekly $22.50 for the support of herself and a minor child. It was further ordered that the plaintiff have leave to apply, from time to time, for such orders at the foot of the judgment as might be necessary for its enforcement and for the protection and enforcement of her rights. Furthermore, a New York statute provided that the court might, upon the application of either party, after due notice to the other, by order, annul, vary or modify such directions.[60] In July, 1904, none of the installments of alimony having been paid, and the New York decree not having been altered, modified or annulled, the wife sued in Connecticut to recover the amount then in arrears. The trial court gave her judgment for $5,805, the arrears of alimony due at the time of the commencement of the action. On appeal this decision was reversed by the Supreme Court of Errors.[61] The court held that by the laws of New York the decree was not final, even as to accrued installments.[62] The decree calling for future payments, even though those sued for were accrued and due, did not, therefore, constitute a debt of record. It was not a final judgment which by virtue of the full faith and credit clause it was the duty of

[57] *Id.* at 28, 57 Atl. 1058 (1904): "The tendency of courts, and the better reason, is in favor of enforcing such decrees where the only question involved is the payment of money. An obvious advantage in this course is that it tends to unify the remedial agencies of the country by making them enforceable in all its parts. It would be a reproach to our system of legal administration if one could escape from the operation of a judicial decree by going into another state. This is one country, and so far as possible it should have one law. Whatever tends to make the operation of law and legal remedies equally effective in all parts of the land is carrying out the true idea of a common country. A party against whom a judgment stands should not be shielded by the fact that he is not in the state where it was rendered. In a state where a decree is given for allowance at stated periods it would be enforced and so it should be enforced elsewhere it can be."

[58] Rogers v. Rogers, 46 Ind. App. 506, 89 N. E. 901 (1909), *rehearing denied*, 46 Ind. App. 506, 92 N. E. 664 (1909); Moore v. Moore, 40 Misc. 162, 81 N. Y. Supp. 729 (1903).

[59] 218 U. S. 1 (1909).

[60] N. Y. CIV. PRAC. ACT, §1170, formerly CODE CIV. PROC., §1771.

[61] Sistare v. Sistare, 80 Conn. 1, 66 Atl. 772 (1907).

[62] "The right of modification or annulment which is thus reserved to the courts is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future." *Id.* at 4, 66 Atl. at 773 (1907), *per* Prentice, J.

the Connecticut court to enforce. It was felt that *Lynde v. Lynde* did not overrule *Barber v. Barber,* but since the New York decree was not final, the *Lynde* case controlled.[63]

In the Supreme Court of the United States, on writ of error brought by the wife, the holding of the Supreme Court of Errors of Connecticut was reversed and that of the trial court affirmed.[64] Mr. Justice White formulated the issue in these terms:

"Where a court of one state has decreed the future payment of alimony, and when an installment or installments of the alimony so decreed have become due and payable and are unpaid, is such a judgment as to accrued and past-due alimony ordinarily embraced within the scope of the full faith and credit clause of the Constitution of the United States so as to impose the constitutional duty upon the court of another state to give effect to such judgment?"[65]

In answering this question, Mr. Justice White held that the two cases were not in conflict, as contended by the opposing counsel, and if they were "*Lynde v. Lynde* must be restricted or qualified so as to cause it not to overrule the decision in the *Barber* case."[66] This conclusion was reached on the following grounds. In the first place, while in the *Lynde* case no reference was made to *Barber v. Barber,* it could not be said that the earlier case was overlooked, because it was referred to by the court below and was cited and commented on in the briefs of counsel in the *Lynde* case. In the second place, in view of the careful opinion in the *Barber* case and of the long interval between the two cases, and the fact that the state courts had uniformly accepted the rule laid down in *Barber v. Barber,* it could not be conceived that the short opinion in *Lynde v. Lynde* was intended to change the settled rule of constitutional construction which had so long prevailed.[67] Interpreting the two cases as in harmony with each other:

"It results: First, that generally speaking, where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming overdue, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber* case, 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony has been made prior to the installments becoming due."[68]

[63] "When rightly interpreted there is no lack of harmony between them." *Id.* at 7, 66 Atl. 772 (1907).
[64] *Supra,* note 61.
[65] 218 U. S. 1, 11 (1909).
[66] *Id.* at 15.
[67] Mr. Justice White said that the ruling in the *Lynde* case was expressly based upon the latitude of discretion which the New Jersey courts were assumed to possess over a decree for the payment of future alimony. *Id.* at 15-16.
[68] *Id.* at 16-17.

It was then found that the New York statutes did not expressly give the power to revoke or modify the accrued installments. They were not, therefore, so completely within the discretion of the court as to bring them within the exceptional rule embodied in the second proposition set forth above.

"And every reasonable implication must be resorted to against the existence of such power, in the absence of clear language manifesting an intention to confer it."[69]

The *Sistare* case thus promulgated a test to be employed to determine whether full faith and credit is to be given an *F-1* alimony decree directing payment in future installments in case the wife seeks in *F-2* to collect the accrued sums. If the *F-1* court can alter, modify or annul even as to the accrued installments, the *F-2* tribunal need not allow recovery thereon. But if the decree cannot be so altered, modified or annulled, it must be recognized. The whole problem thus becomes one of resolving the power of the *F-1* court. The case further formulated a rule of construction. If a statute or decree does not in clear and express words grant or reserve the power to alter or annul, every reasonable implication is to be resorted to against such power. Every effort is to be made to apply the rule of the *Sistare* case. It seems to be the desire of the court to enforce such installment payments wherever possible, but at the same time to adhere to the patterns laid down for the enforcement of foreign money judgments generally. The tests laid down in the *Sistare* case have apparently been adequate because in the thirty years since that decision no other case, on this exact point, has been considered by the Supreme Court.

The state courts have consistently followed the rule of the *Sistare* case. Where *W* has obtained in *F-1* a decree for alimony payable in future installments, the decree being unalterable and revocable as to accrued sums, she has uniformly been held entitled to recover these payments in *F-2*.[70] Very properly every effort has been made to make the wife's claim enforceable. This is as it should be. But the state courts have refused to give full faith and credit to the *F-1* decree where such decree is so within the discretion of the *F-1* court as to past due installments that the qualification mentioned by Mr. Justice White applies. Thus, where *W* has secured a decree for

[69] *Id.* at 22, *per* White, J.

[70] Cotter v. Cotter, 225 Fed. 471, 475 (C. C. A. 9th, 1915): "In Washington, while the court may discontinue alimony permanently when granted in monthly installments until further order of the court, it may not modify a decree as to installments of alimony past due and unpaid." *Per* Wolverton, J.; Straus v. Straus, 4 Cal. App. (2d) 461, 41 P. (2d) 218 (1935); Phillips v. Kepler, 47 App. D. C. 384 (1918); Carmona v. Naron, 37 Idaho 482, 217 Pac. 597 (1923); Paulin v. Paulin, 195 Ill. App. 350 (1915); Rosenberg v. Rosenberg, 152 Md. 49, 135 Atl. 840 (1927); Taylor v. Stowe, 218 Mass. 248, 105 N. E. 890 (1914); Gutowski v. Gutowski, 266 Mich. 1, 253 N. W. 192 (1934); McCullough v. McCullough, 203 Mich. 288, 105 N. W. 890 (1918); Tehsman v. Tehsman, 93 N. J. Eq. 76, 114 Atl. 320 (1921); Bolton v. Bolton, 86 N. J. L. 622, 92 Atl. 389 (1914); Babcock v. Babcock, 147 Misc. 900, 265 N. Y. Supp. 470 (1933), *aff'd*, 239 App. Div. 884, 265 N. Y. Supp. 474 (1933), *appeal dism'd*, 263 N. Y. 665, 189 N. E. 747 (1934); Beech v. Beech, 211 App. Div. 720, 208 N. Y. Supp. 98 (1925); Van Horn v. Van Horn, 196 App. Div. 472, 188 N. Y. Supp. 98 (1921); Tiedemann v. Tiedemann, 172 App. Div. 819, 158 N. Y. Supp. 851 (1916); Williamson v. Williamson, 169 App. Div. 597, 155 N. Y. Supp. 423 (1915); Patton v. Patton, 67 Misc. 404, 123 N. Y. Supp. 329 (1910); Armstrong v. Armstrong, 117 Ohio St. 558, 160 N. E. 34 (1927); Campbell v. Campbell, 28 Okla. 838, 115 Pac. 1111 (1911); De Vall v. De Vall, 57 Ore. 128, 109 Pac. 755 (1910); Stewart v. Stewart, 193 Atl. 860 (N. J. 1937); Caples v. Buell, 234 S. W. 429 (Tex. Civ. App. 1921); Caples v. Caples, 47 F. (2d) 225 (C. C. A. 5th, 1931).

future alimony in *F-1*, which is there subject to the discretion and power of the *F-1* court, even as to accrued installments, she has been denied relief in *F-2*, under the qualification of the rule in *Sistare v. Sistare*.[71] The judgment even in *F-1* was in no sense final.

The law of *F-1*, statutory as well as judicial, thus becomes the determining factor in deciding whether the *F-1* decree calling for installment payments is to be enforced in *F-2*. The proof of the *F-1* law is, therefore, of paramount importance. On this point no uniform policy has been adopted. A number of courts require the plaintiff to allege and prove that the *F-1* decree, as to accrued installments, is not subject to modification. In *Lape v. Miller*,[72] the court said:

"Courts of one state do not take judicial knowledge of the laws of another one, whether they be statutory or of judicial determination; and the existence of such laws, as well as their import, force and effect, must be proven, if denied, the same as any other fact in issue."[73]

Other courts throw the burden of proving the *F-1* law upon the defendant. In *Curran v. Curran*,[74] the court stated:

"Here there is no proof by the defendant, . . . to show that the right to recover the arrears of alimony is not a vested one. Nor has it been shown that the decree has been modified prior to the coming due of the installments."

The courts which adopt this view indulge in a presumption that the *F-1* decree is final in regard to accrued installments.[75] This view is preferable both from the legal and the social standpoint. The defendant is trying to escape compliance with the *F-1* judgment; the burden, therefore, should be placed on him. Every effort should be

[71] McAlister v. McAlister, 214 Ala. 345, 107 So. 843 (1926) [in regard to a Louisiana decree]; Lape v. Miller, 203 Ky. 742, 263 S. W. 22 (1926) [the defendant had answered that the Ohio decree was not final even as to accrued installments, and it was held that the plaintiff's demurrer thereto should have been overruled, the court refusing to take notice of Ohio law]; Webster v. Webster, 177 La. 306, 148 So. 241 (1933) [where it was held that under Michigan law even accrued installments remained subject to court modification; MICH. COMP. LAWS (1929) §12747; Skinner v. Skinner, 205 Mich. 243, 171 N. W. 383 (1919)]; Gallant v. Gallant, 154 Miss. 832, 123 So. 883 (1929) [in regard to Louisiana law; LA. CIV. CODE (Dart, 1932) art. 160]; Bentley v. Calabrese, 155 Misc. 843, 280 N. Y. Supp. 454 (1935) [in regard to Massachusetts law, Williamson v. Williamson, 246 Mass. 270, 140 N. E. 799 (1923); McElroy v. McElroy, 208 Mass. 458, 94 N. E. 696 (1911); Hill v. Hill, 196 Mass. 509, 82 N. E. 690 (1907), MASS. GEN. LAWS (1932), c. 208, §37]; Smith v. Smith, 249 App. Div. 660, 291 N. Y. Supp. 635 (1936) [in regard to New Jersey law]; Levine v. Levine, 95 Ore. 94, 187 Pac. 609 (1920) [in regard to Minnesota law]; Hanson v. Hanson, 18 F. Supp. 527 (M. D. Pa. 1937) [where the court followed the interpretation of New Jersey law laid down in Lynde v. Lynde]; Hewett v. Hewett, 44 R. I. 308, 116 Atl. 883 (1922) [in regard to Massachusetts law]; Gaffey v. Criteser, 195 S. W. 1166 (Tex. Civ. App. 1917), *aff'd*, Criteser v. Gaffey, 222 S. W. 193 (1920) [in regard to Oregon law]; Ogg v. Ogg, 165 S. W. 912 (Tex. Civ. App. 1914) [in regard to New York law].

[72] 203 Ky. 742, 746, 263 S. W. 22 (1924), *per* Thomas, J.

[73] Accord: Page v. Page, *supra* note 54; Ogg v. Ogg, *supra* note 71.

[74] 136 Misc. 598, 600, 240 N. Y. Supp. 64 (1930), *per* Noonan, J.

[75] Alexander v. Alexander, 164 S. C. 466, 472, 162 S. E. 437 (1932): "The finality of the Maryland decree as to the right of the plaintiff to payments fully matured under its provisions must be presumed when there is no proof of any Maryland law to the contrary." *Per* Blease, C. J. See also Phillips v. Kepler, 47 App. D. C. 384, 387 (1918).

made in *F-2* to enforce the decree. A few courts of their own accord examine the law of *F-1*. In *Hewett v. Hewett*,[76] the court said:

"The case is before us on demurrer and unless we take judicial notice of the laws of Massachusetts we have no information as to whether the plaintiff by virtue of the decree in question has a vested right to demand and receive the installments which have become due."

And above all it is to be noted that the courts follow the rule of construction set forth by Mr. Justice White in *Sistare v. Sistare*. This policy has been well expressed in *Phillips v. Kepler*:[77]

"If we may reason from the rule which obtains in statutory construction, a retroactive effect should not be given to the exercise of any power to recast a decree, unless the language defining the power leaves no choice."[78]

On the whole the state courts have adhered rather closely to the federal doctrine enunciated in *Sistare v. Sistare*.[79] They have not given effect to the *F-1* decree unless required to do so by the full faith and credit clause.

At this point reference must be made to the Minnesota case of *Holten v. Holten*.[80] The plaintiff had obtained in Oregon a divorce with alimony of $150 a month during her lifetime. The husband having moved to Minnesota, and the wife having applied to the divorce court for a judgment covering the unpaid installments, a decree was entered in her favor for $6,076.75. She then sued the defendant in Minnesota to recover this sum. The trial tribunal, finding that the Oregon court did not have power to modify accrued installments,[81] gave judgment for $6,076.75 with interest. While the Supreme Court of Minnesota did not agree as to this point with the trial court the decision was affirmed.[82] The court said:

"Following *Sistare v. Sistare*, we hold that so long as the judgment is absolute in its terms and remains unmodified, or at least until an application for modification has been made, it is final as to instalments of alimony which have accrued. Sound public policy forbids the adoption of a rule which would permit a husband to escape his obligation to support his wife or infant children by crossing a state line."[83]

For reasons of policy the court excluded the qualification of the general rule enunciated in *Sistare v. Sistare*,[84] and held that even if a judgment for alimony is subject to modification as to accrued installments, it is still entitled to full faith and credit in *F-2*, so long as no application for modification appears to have been made. It is thus in conflict with *Lynde v. Lynde*,[85] going much further than is required by the

[76] 44 R. I. 308, 310-311, 116 Atl. 883 (1922), *per* Rathbun, J. *Contra:* Lape v. Miller, *supra* note 71.
[77] 47 App. D. C. 384, 387 (1918), *per* Smyth, C. J.
[78] See also Campbell v. Campbell, *supra* note 70; Levine v. Levine, *supra* note 71.
[79] See the cases cited in notes 70 and 71.
[80] 153 Minn. 346, 190 N. W. 542 (1922).
[81] *Id.* at 348, 190 N. W. 542.
[82] "We also hold that irrespective of the so-called judgment of December 31, 1919 [the Oregon judgment for accrued alimony], the plaintiff was entitled to recover the amount of the installments which had accrued." *Id.* at 352, 190 N. W. 542, 544, *per* Lees, C.
[83] *Id.* at 351, 190 N. W. 542, 544.
[84] See *supra* note 59.
[85] *Supra* note 45.

full faith and credit clause. The rule is apparently broadened to include all decrees for alimony. Though improperly based on the full faith and credit clause, where no application has been made to modify the *F-1* decree, the decision might be justified on the ground of comity,[86] on the theory that the Supreme Court merely prescribed the minimum recognition which must be accorded the *F-1* decree. It is submitted that *Holten v. Holten* exhibits an enlightened policy.

The California courts and those of a few other states have gone still farther. They have established the *F-1* decree as a judgment of their own courts.[87] The decree can thus be enforced as a domestic judgment. New York by statute has in a limited type of case done something much the same.[88]

Hitherto our discussion has been devoted to the problem of permanent alimony—nothing has been said concerning the recovery in *F-2* of payments accruing under an *F-1* decree for alimony *pendente lite*.[89] The object is to provide for the wife during the pendency of some matrimonial suit. Such an award is always subject to modification or revocation by the court which granted it.

"An award of temporary alimony creates a mere personal right limited in its enforcement to the proceeding pending which it was granted. *In re Hudes' Estate,* 128 Misc. 362, 219 N. Y. S. 435. All proceedings to compel the payment of temporary alimony are limited to the action in which the order for alimony was granted. . . . Thus it would appear that temporary alimony awarded in the State of New York may not be reduced to final judgment under the Practice Act of that state."[90]

This being the situation, it is not at all surprising to find that the *F-2* courts follow the qualification laid down in *Sistare v. Sistare,* and refuse to enforce an *F-1* decree for alimony *pendente lite.* This is the position very generally taken.[91] Not being a final judgment for an absolute debt, the husband's duty being subject to modification, "no action can be maintained on a mere interlocutory order for alimony *pendente lite.*"[92]

[86] 41 A. L. R. 1419, 1421 (1926).

[87] Palen v. Palen, 12 Cal. App. (2d) 357, 55 P. (2d) 228 (1936); Straus v. Straus, 4 Cal. App. (2d) 461, 41 P. (2d) 218 (1935); Creager v. District Court, 126 Cal. App. 280, 14 P. (2d) 552 (1932); Cummings v. Cummings, 97 Cal. App. 144, 275 Pac. 245 (1929).

[88] N. Y. CIV. PRAC. ACT, §§1171, 1172.

[89] See 2 VERNIER, AMERICAN FAMILY LAWS 309-321, 460-462.

[90] Kelly v. Kelly, 121 N. J. Eq. 361, 362-363, 189 Atl. 665 (1937), *per* Rafferty, J. See Doncourt v. Doncourt, 245 App. Div. 91, 281 N. Y. Supp. 535 (1935); N. Y. CIV. PRAC. ACT, §1169.

[91] Kelly v. Kelly, *supra* note 90. The plaintiff wife sued in New Jersey to recover the arrears of alimony *pendente lite* awarded in a New York divorce suit. A decree in favor of the plaintiff was reversed. Since under New York law accrued temporary alimony is subject to extinguishment by the termination of the action, it may also be modified. "If the prerequisite judgment may not be entered in the New York courts which granted the award of temporary alimony, that award may not be enforced in another forum. Further, if temporary alimony may not form the basis for an independent action in New York and if proceedings for the collection of any arrears of temporary alimony must be brought in the action in which the order was granted and is not otherwise enforceable, it would seem illogical to permit temporary alimony to form the basis of an independent action in a foreign jurisdiction." *Per* Rafferty, J., at 365.

Hamilton v. Hamilton, 113 Conn. 306, 155 Atl. 217 (1931); Geisler v. Geisler, 124 Ky. 292, 98 S. W. 1023 (1907); Mills v. Mills, 95 Misc. 231, 158 N. Y. Supp. 753 (1916); Van Horn v. Van Horn, 48 Wash. 388, 93 Pac. 670 (1908); Henry v. Henry, 74 W. Va. 563, 82 S. E. 522 (1914).

[92] 2 BEALE, CONFLICT OF LAWS 1393. Compare Paul v. Paul, 121 Kan. 88, 90, 245 Pac. 1022 (1926), *petition for rehearing denied,* 121 Kan. 363 (1926): "The present case may perhaps be distinguished from

Again, it would seem that the courts are being overly technical; that they are unduly influenced by the law concerning the extraterritorial enforcement of money judgments in general; that they have failed to consider the social problems involved in the award of temporary alimony. Here, even more than in the case of permanent alimony, is the award based upon the necessities of the wife. If the husband is able to escape his obligations by going to *F-2*, something is the matter with the law in this field.

So far we have discussed alimony that is due and payable. We must now turn to the problem of future installments. What can the wife do in *F-2* in regard to such? Not having accrued, not being due and owing, they are not a debt within the technical meaning of the term. Generally by express reservation in the decree or by statute the *F-1* court is empowered to revoke or modify such future payments.[93] Certainly, under the qualification enunciated in the *Sistare* case,[94] it would seem clear that the Supreme Court would not require that full faith and credit be accorded thereto.

The enforcement of future payments necessitates making the *F-1* judgment a decree of the *F-2* tribunal. This would enable the wife to invoke the sanctions available to one obtaining a local alimony decree.

From a social standpoint, much can be said in favor of such a view. In the first place, instead of forcing the wife to sue again and again for accrued payments as they become due, she would have a more effective remedy. Again, a delinquent husband would not be favored, as he now is in *F-2*, but would be subject to the full sanctions of a local decree. Certainly, no one would quarrel with this. Furthermore, it is clearly in the public interest that the husband's obligation to support his wife and children be enforced up to the hilt. Lastly, the fact that the decree is subject to modification by the *F-1* tribunal would of itself be no reason why it should not be made a decree of *F-2*, especially where no such modification has occurred. That forum can by appropriate action conform its decree thereto.

Those courts which adhere to the strict analysis of *Sistare v. Sistare*, bothered as they are by the "lump concept" of viewing a decree for alimony as a mere money judgment, uniformly deny such enforcement to the plaintiff. On the basis of the enforcement of money judgment generally, this is logical, but it is submitted that there is more at stake where problems of support are involved. These courts say that the plaintiff has ample protection by bringing her action for accrued installments.[95]

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these [*supra*] by the fact of the order for temporary alimony having explicitly been made enforceable by execution, giving it to that extent the character of a final judgment." *Per* Mason, J. See also Wallace v. Wallace, 111 Cal. App. 500, 295 Pac. 1061 (1931).

[93] See *supra* note 30.

[94] See *supra* note 59.

[95] German v. German, 122 Conn. 155, 164-165, 188 Atl. 429, 432-433 (1936): "As regards instalments due in the future, there would be no question of the power of the courts of New York to modify the decree. . . . The decree before us is not, therefore, enforceable in our courts as regards payments falling due in the future." *Per* Maltbie, C. J. See also Kossower v. Kossower, 142 Atl. 30 (N. J. 1928).

Alexander v. Alexander, 164 S. C. 466, 476-477, 162 S. E. 437 (1932): "In Maryland courts of equity have power to modify provisions as to alimony in decrees of divorce *a mensa* or *a vinculo* and retain

But a few courts, led by California, have allowed the plaintiff to establish the *F-1* decree as a decree of the *F-2* tribunal, and give enforcement thereto the same as to a local decree.[96] In *Cummings v. Cummings*,[97] the judgment was for a sum equal to the amount due under the New York judgment, including all installments down to the entry of the judgment, and for $65 per month thereafter, but only so long as the decree of the New York court remained unmodified, leave being given to apply for a modification if the New York court modified its decree, giving the plaintiff the equitable relief to which she would be entitled under a California decree.[98] In *Palen v. Palen*,[99] the court said:

"It is settled that a judgment for alimony obtained in another state may be established in this state for the purpose of enforcing it as a continuing judgment in this state for the payment of alimony."

The courts of a few other states have been willing to do the same thing.[100] This trend, while still imperceptible, is, it is submitted, clearly a step in the right direction.

If the decree is final and not subject to modification even as to the future installments, what about the situation?[101] Would the position taken primarily by the California courts be more sound? Possibly so, but the argument can still be made that the installments not having accrued, they are not due and do not constitute a debt. Therefore, the decree will not be enforced until the payments have become due. The question really is whether the *F-1* decree is to be enforced at law or in

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continuing jurisdiction over such decrees as to future payments of alimony. For these reasons the decree is not a final one in respect to the future payments of alimony." *Per* Blease, C. J.

[96] See cases cited in note 87, *supra*.

[97] 97 Cal. App. 144, 275 Pac. 245 (1929), discussed in (1932) 29 COL. L. REV. 832.

[98] Creager v. Superior Court, 126 Cal. App. 280, 14 P. (2d) 552 (1932), discussed in (1933) 81 U. OF PA. L. REV. 342: Petitioner's wife was granted a divorce by a Nevada court, and the petitioner was ordered to pay $30 a month alimony. By a bill in equity in California she secured an order directing payment of the amount in arrears and establishing the Nevada decree. On the petitioner's failure to observe this decree, the court ordered him to show cause why he should not be adjudged guilty of contempt for failure to comply with its decree. The petitioner then brought a writ of prohibition, claiming that there was no equitable jurisdiction in the California court, since the Nevada decree was enforceable there only as a money judgment. It was held that the equitable enforcement was proper. "We think it entirely clear that the judgment of the respondent court gave full faith and credit to the Nevada decree in its entirety. By its terms the Nevada judgment was 'established herein as a foreign judgment.' If such recognition exceeds the requirements of the federal Constitution, but is authorized by the laws of this state, petitioner may not complain. . . . For the purpose of enforcement in this state, we believe that the respondent court properly treated its own judgment, based upon and establishing the Nevada judgment, in the same manner as an award of alimony by the respondent court." *Per* Spence, J., pp. 282-283.

[99] 12 Cal. App. (2d) 357, 358, 55 P. (2d) 288 (1936), *per* Gould, J. Here a Missouri judgment was established as a judgment of the California court. In Straus v. Straus, *supra* note 87, the same was done with a New York decree.

[100] Fanchier v. Gammill, 148 Miss. 723, 114 So. 813 (1927), discussed in (1928) 41 HARV. L. REV. 798; Cousineau v. Cousineau, 155 Ore. 184, 63 P. (2d) 897 (1936); Shibley v. Shibley, 181 Wash. 166, 42 P. (2d) 446, 97 A. L. R. 1191 (1935).

In Fanchier v. Gammill, the court said: "A decree for alimony granted by a foreign court may be established and enforced by and through courts of equity in one state, and that our equity courts may assume jurisdiction of the alimony decree and establish and enforce it." *Per* Holden, J., at 737.

[101] This was the situation in Fanchier v. Gammill, *supra* note 100, and in Creager v. Superior Court, *supra* note 98. By Nevada practice an alimony decree is not open to modification. Sweeney v. Sweeney, 42 Nev. 431, 179 Pac. 638 (1919).

equity. At law relief can be given only for what is due, while equity may direct payment in the future.

Let us now summarize the law as it has developed since the case of *Barber v. Barber*. An alimony decree of a court of competent jurisdiction in *F-1*, is, under certain circumstances, a debt of record, entitled to full faith and credit in *F-2*. If it calls for a lump sum payment, it will, on the analogy of an ordinary money judgment, be enforced. Where the decree calls for periodic payments, it is enforceable in *F-2* as to the sums due only if the *F-1* court has not the power to alter or revoke the accrued installments. But if the *F-1* court has such power, then, since no right to alimony vests in the wife, she cannot recover even the sums which have accrued, save in a few states. In such a case, however, if she gets the *F-1* tribunal to give a judgment for the sums due, such judgment, like any other money decree, will serve as the basis for an action in *F-2*. Where the language of the *F-1* statute or decree reserving the power to alter or annul is not perfectly clear, every reasonable implication is resorted against the existence of such power. Furthermore, most jurisdictions as we have seen, refuse to give any effect to payments which have not fallen due. A few states, it is true, have established the *F-1* decree as a judgment of their own courts in order to enforce future payments. And lastly, no action can be maintained on an interlocutory order of *F-1* for alimony *pendente lite*.

We must now consider how and in what ways the *F-2* court will enforce the *F-1* decree for alimony. Hitherto our discussion has been in regard to the type of alimony which *F-2* must recognize. In *German v. German*,[102] the court stated:

"The constitutional provision, however, only requires that the courts of a state other than that in which the decree is rendered shall give effect to it by the ordinary remedies appropriate to an action upon a judgment; that court is not required to apply any special remedies provided by the laws of the State in which the decree was rendered, nor any special remedies provided by its own laws to enforce similar decrees made by its own courts."[103]

Thus, under proper circumstances, *F-2* must give full faith and credit to the *F-1* alimony decree; it is a final and conclusive adjudication of the rights of the spouses. But it has been stated again and again that *F-2* need not give to the wife the special remedies to which she would have been entitled in *F-1*.[104] Certainly it would not be expected that *F-2* should give the wife remedies which it is not empowered to use in the enforcement of its own decrees. And similarly the position has been taken quite

[102] 122 Conn. 155, 158, 188 Atl. 429 (1936), *per* Maltbie, C. J.

[103] See M'Elmoyle v. Cohen, *supra* note 23. 2 BEALE, CONFLICT OF LAWS 1377: "The method of enforcement of a foreign judgment is governed by the law of the forum."

[104] Lynde v. Lynde, *supra* note 45; Sistare v. Sistare, *supra* note 59; White v. White, 223 Mass. 39, 123 N. E. 389 (1919); Bullock v. Bullock, 51 N. J. Eq. 444, 27 Atl. 435 (1893); Tiedemann v. Tiedemann, 172 App. Div. 819, 158 N. Y. Supp. 851 (1916). In the latter case, the court stated: "But this duty does not require the *enforcement* of the judgment of the sister state, and, therefore, does not apply to the provisions of a judgment in a suit in equity which are incidental to the main relief, and are in the nature of an execution of the judgment itself. . . . But if the courts of this State should require the defendant to account for any community property there may be here, that would be enforcing the Nevada decree and the incidental provision thereof based upon the statute law of that State which has no extraterritorial effect. . . . " *Per* Laughlin, J., at 824-825.

generally that the special remedies available in regard to a local alimony decree are not open to the wife.[105]

The enforcement of a foreign judgment, at common law, was by an action of debt. This is still the ordinary remedy by which to enforce a foreign money judgment. On the theory that a decree for alimony is a mere money judgment, the *F-2* courts very generally restrict the wife to an action of debt.[106] According to these courts, the *F-1* alimony decree is, when before them, merely a debt of record just like any other debt, having lost any special characteristics it may have had as a decree for alimony.[107] Crossing the state frontier, therefore, produces far-reaching effects—the alimony decree becomes a mere money judgment for which the appropriate remedy is an action at law—no resort to equity being permitted because the legal remedy is plain, adequate and complete.[108]

Mr. Justice Wayne said in the famous case of *Barber v. Barber*:[109]

"And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction."

Had this language been followed, the law concerning the enforcement of foreign alimony decrees would have developed along quite different lines. But it was in conflict with the statements Mr. Justice Wayne had made many years before in *M'Elmoyle v. Cohen*.[110] And it was not until sixty-nine years after these words were uttered that a court for the first time proceeded in accordance therewith. In *Fanchier*

[105] Lynde v. Lynde, 41 App. Div. 280, 58 N. Y. Supp. 567 (1899), *aff'd*, 163 N. Y. 405, 56 N. E. 979 (1900).

[106] Grant v. Grant, 75 F. (2d) 655 (App. D. C. 1935), where the wife's bill in equity to have the court direct the defendant "to specifically perform" a Maryland alimony decree was dismissed; Davis v. Davis, 29 App. D. C. 258, 263 (1907), where the wife's prayer for the execution of a Kansas decree was denied for want of jurisdiction in equity, because she had an adequate remedy at law, Shepard, C. J., stating: "For all purposes of its enforcement in this jurisdiction, therefore, the award of alimony (Kansas decree) is to be regarded as a debt, merely, and enforceable only as such by execution at law"; Worsley v. Worsley, 76 F. (2d) 815 (1935), where the wife's bill to enforce a Virginia alimony decree was dismissed on authority of Grant v. Grant and Davis v. Davis; Weidman v. Weidman, 274 Mass. 118, 174 N. E. 206 (1931), discussed in (1931) 29 MICH. L. REV. 1071, compare White v. White, 223 Mass. 35, 123 N. E. 389 (1919); Page v. Page, 189 Mass. 85, 75 N. E. 92 (1905); Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890 (1908), where contempt proceedings were held not available to enforce an Oklahoma decree; Kossower v. Kossower, 142 Atl. 30 (N. J. 1928); Bennett v. Bennett, 63 N. J. Eq. 306, 49 Atl. 50 (1901), where the court refused to enforce a North Dakota decree, saying: "This provision (the full faith and credit clause) does not make the foreign decree or judgment a record to be enforced without further proceedings in the state to which it is taken, nor does it refer to the remedy or means of enforcing it, but only provides that the facts found in the foreign court upon which the judgment or decree was entered cannot be inquired into by the courts of the sister states." *Per* Voorhees, J., pp. 307-308; Wood v. Wood, 7 Misc. 579, 28 N. Y. Supp. 154 (1894).

Compare Wagner v. Wagner, *supra* note 27.

MICH. COMP. LAWS (1929) §§12770-12772, provide that the foreign alimony decree is enforceable by an action at law.

[107] See cases cited in note 106; also White v. White, 223 Mass. 39, 139 N. E. 389 (1919).

[108] Davis v. Davis, *supra* note 106; Bennett v. Bennett, *supra* note 106.

[109] 21 How. 582, 591 (U. S. 1858).

[110] *Supra* note 23.

v. Gammill,[111] a wife who had secured in Nevada a divorce with alimony payable in installments, brought a bill in equity in Mississippi to enforce the decree and to recover the arrears. On appeal the judgment sustaining the defendant's demurrer was reversed. On policy grounds the wife was not restricted to legal execution; the *F-2* equity court may enforce the *F-1* alimony decree.[112] The Mississippi court felt that it was required under the full faith and credit clause to establish the Nevada decree and to enforce it by equitable process, because an alimony decree is entitled to the extraordinary means of enforcement on account of its peculiar characteristics.

California, as we have seen, has on several occasions, pursued a similar policy.[113] In *Cousineau v. Cousineau,*[114] in addition to back sums due under a California decree the defendant was ordered to make the payments in the future, the California decree as to the future installments was thus made the basis of an Oregon judgment. The court stated:

"If comity is the basis of the full faith and credit requirement, the decisions of our neighboring states (California and Washington), ought to be peculiarly persuasive, and we should endeavor to do as much for our neighbors as their courts stand prepared to do for the people of this state."[115]

In *Shibley v. Shibley,*[116] the Washington court gave equitable enforcement to a California alimony decree.[117] The Minnesota court followed suit in *Ostrander v. Ostrander.*[118] The Connecticut court in *German v. German*[119] enforced by contempt

[111] *Supra* note 100.

[112] "It is our view that, on account of the character of a judgment for alimony, which rests, to some extent, upon public policy, in requiring a husband to support his wife and children, due to the sacred human relationship, and that they may not become public charges and derelicts, the decree for alimony, with the extraordinary power of enforcement by attachment and contempt proceedings, should be established and enforced by our equity court, which has full and sole jurisdiction of all matters of divorce and alimony; because to hold that a foreign judgment for alimony can be enforced in this state only by execution, the same as judgments at law, would be to impair or to deprive a foreign judgment for alimony of its inherent power of enforcement by attachment and contempt proceedings. Thus, as we view it, to so hold would be to disregard the 'full faith and credit' clause of the Federal law, which we interpret to mean that the judgment, with its peculiar right of enforcement, as one for alimony, should be established and enforced by the equity courts of our state in the same manner, and to the same extent, as it could have been enforced by our court if originally obtained in our state." *Per* Holden, J., at 737.

[113] Creager v. District Court, *supra* note 98; Cummings v. Cummings, *supra* note 97. In the Cummings case, it is true, because the husband had done everything he could to evade the New York alimony decree, the court had ample reason to feel that the wife's legal remedy was inadequate.

[114] 155 Ore. 184, 63 P. (2d) 897 (1936).

[115] *Id.* at 197, 63 P. (2d) 897 (1936), *per* Rossman, J.

[116] 181 Wash. 166, 42 P. (2d) 446 (1935).

[117] "We adopt this procedure not on account of the rule of comity enjoined by the full faith and credit clause of the Federal constitution, but because, as a matter of public concern and equitable power, the enforcement in this state of such decrees for alimony and support money should not depend solely upon ordinary execution, but that the common practice in this state with respect to all the remedies for the enforcement of such decrees as if originally entered here should be followed and enforced." *Per* Mitchell, J., at 170.

[118] 190 Minn. 547, 252 N. W. 449 (1934), discussed in (1934) 18 MICH. L. REV. 589, (1934) 11 N. Y. U. L. Q. REV. 634, (1934) 1 U. OF CHI. L. REV. 811: The plaintiff had been awarded in South Dakota a divorce with alimony payable in installments. Her husband who had remarried wilfully refused to comply with the judgment. He had no property on which execution could be levied, and he persistently assigned his salary to his second wife to escape payment. The plaintiff obtained equitable relief in Minnesota to compel payment, the trial court having found that the wife had no adequate remedy at law.

process alimony which had accrued under a New York decree, but refused to order specific performance of the judgment because the New York courts retain the power to modify future alimony.

Thus *Fanchier v. Gammill* has been followed by a small but respectable body of authority. But the later decisions have not been placed on the requirement of the full faith and credit clause. This, it is submitted, is correct; a state is not obligated to afford any different relief to an *F-1* alimony decree than it affords to any ordinary *F-1* money judgment.[120] But it is not prevented from doing so if it so desires. And it must further be noted that in *Ostrander v. Ostrander* and *German v. German* equitable enforcement was given merely in regard to the accrued payments, while in the other cases the *F-1* decree was established so as to secure future sums as well.

Even prior to *Fanchier v. Gammill,* New York, by statutory enactment, had taken steps to give the wife a more effective remedy in regard to the *F-1* alimony decree. This was because of *Lynde v. Lynde,*[121] which had denied to the wife in New York in the enforcement of the New Jersey alimony decree the statutory remedies of security, receivership, sequestration and contempt process. To remedy this situation[122] Sections 1772 and 1773 of the Code of Civil Procedure, now Civil Practice Act, Sections 1171[123] and 1172,[124] were amended in 1904.

For Section 1171 to apply, the alimony order must have been given in a suit for divorce on the ground of adultery, or in a suit for separation for one of the grounds specified in Civil Practice Act, Section 1161,[125] and the action must be brought to

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"Because of the nature of defendant's obligation and its origin, the enforcement of his duty is as much in need of attention of sovereign power as though he had remained in South Dakota. Transplantation of the parties from one state to another has not reduced the obligation to the ordinary category of 'a debt of record.'" *Per* Stone, J., at 549.

[119] *Supra* note 95.

[120] Lynde v. Lynde, *supra* note 45; Sistare v. Sistare, *supra* note 59.

[121] 41 App. Div. 280, 58 N. Y. Supp. 567 (1899), *aff'd,* 162 N. Y. 405, 56 N. E. 979 (1900).

[122] See Moore v. Moore, 143 App. Div. 428, 431, 128 N. Y. Supp. 711 (1911).

[123] CIV. PRAC. ACT, §1171: "Where a judgment rendered or an order made in this state for divorce or separation, *or a judgment rendered in another state for divorce upon the ground of adultery, or for separation or separate support for any of the causes specified in section eleven hundred and sixty-one of this act, upon which an action has been brought in this state and judgment rendered therein,* requires a husband to provide . . . for the support of his wife, the court, in its discretion, may also direct him to give reasonable security . . . for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such judgment or order, whether he has or has not given security therefor, or to pay any sum of money for the expenses of the plaintiff, or her support and maintenance, . . . the court may cause his personal property and the rents and profits of his real property to be sequestered, and may appoint a receiver thereof. . . ." The italicized portions were added by N. Y. Laws 1904, c. 318.

[124] N. Y. CIV. PRAC. ACT, §1172: "Where the husband, in an action for divorce or separation, *or for the enforcement in this state of a judgment for divorce or separation rendered in another state,* makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the sequestration of his property, or by resorting to the security, . . . the court may, in its discretion, make an order requiring the husband to show cause . . . why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court other than a criminal contempt. . . ." The italicized portions were added in 1904.

[125] The grounds for a judicial separation are:

"(1) The cruel and inhuman treatment of the plaintiff by the defendant; (2) such conduct on the part of the defendant toward the plaintiff as may render it unsafe and improper for the latter to cohabit

judgment in New York. These conditions the New York courts have rigidly enforced.[126] If the divorce or separation was obtained on grounds other than those specified, Section 1171 does not apply.[127] Furthermore, the *F-1* decree must be reduced to judgment in New York.[128] This is not done by a suit in equity even though equitable remedies are granted.[129] If the court, under Section 1171, orders the husband to give security and he fails to do so, contempt proceedings are not available, sequestration being the limit of the statutory remedy.[130] And in *Boissevain v. Boissevain,*[131] it was held that Section 1171 is not applicable where the alimony decree was rendered in a foreign country (Holland, in this case) and not in a sister state.

Section 1172[132] allows contempt proceedings to enforce the duty to pay. It is to be noted that this section does not in so many words contain the qualifications set forth in Section 1171, that the *F-1* divorce must be on the ground of adultery or the separation for one of grounds specified in Section 1161. Instead, it provides "for the enforcement in this state of a judgment for divorce or separation rendered in another state. . . ." It has been held, and it is submitted, properly, that this section must be construed in the light of Section 1171, and that the two sections must therefore be read together.[133] This would seem to have been the legislative intent—otherwise the anomaly would result of allowing the sanction of contempt, the most powerful of all alimony enforcement devices, in the case of all foreign decrees no matter what the ground, and of restricting the lesser sanctions of security and sequestration to decrees granted for the specified causes. Under this construction a foreign decree is placed on a par with a domestic decree. Again, under Section 1172, in order to obtain the statutory relief, the *F-1* decree must be made a judgment of the New York court,[134] and a direction to pay granted in the judgment. Otherwise it will be construed as an ordinary law judgment.[135]

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with the former; (3) the abandonment of the plaintiff by the defendant; (4) where the wife is plaintiff, the neglect or refusal of the defendant to provide for her."

[126] Beech v. Beech, 211 App. Div. 720, 208 N. Y. Supp. 98 (1925).

[127] Beech v. Beech, *supra* note 126; Barber v. Warland, 139 Misc. 398, 247 N. Y. Supp. 455 (1930), divorce in Massachusetts on ground of desertion.

[128] Smith v. Smith, 249 App. Div. 660, 291 N. Y. Supp. 635 (1936).

[129] Beech v. Beech, *supra* note 126: "The law is well settled that an action can be brought in this state upon a judgment of this nature and a money judgment procured for alimony. Such a judgment when obtained can be enforced in accordance with our laws applicable thereto. The action, however, is not an equitable one, although the court may, in certain cases, under the provisions of section 1171 of the Civil Practice Act, grant relief of an equitable nature." *Per* Merrell, J., at 721. Accord: Barber v. Warland, *supra* note 127. *Cf.* Moore v. Moore, 143 App. Div. 428, 128 N. Y. Supp. 711 (1911), *aff'd*, 208 N. Y. 97, 101 N. E. 711 (1913).

[130] Moore v. Moore, *supra* note 129.

[131] 252 N. Y. 178, 169 N. E. 130 (1929), discussed in (1929) 29 COL. L. REV. 522.

[132] See note 124, *supra.*

[133] Miller v. Miller, 219 App. Div. 61, 219 N. Y. Supp. (1926), *aff'd without opinion,* 246 N. Y. 636, 159 N. E. 681 (1927): "We believe that sections 1171 and 1172 of the Civil Practice Act must be read together, and as so read under the construction given by this court in the Beech case to section 1171 of the Civil Practice Act, the plaintiff herein having sued on a decree of a foreign court (Nevada) granting a divorce on the ground of cruelty, is limited under section 1172 of the Civil Practice Act to the recovery of a money judgment for the amount representing alimony for the support of himself and her children due and unpaid at the time specified in the order appealed from, which judgment can be enforced by execution." *Per* Burr, J., at 64-65.

[134] Rohden v. Rohden, *supra* note 24.

[135] Wemple v. Wemple, 219 App. Div. 241, 219 N. Y. Supp. 638 (1937).

Such is the state of the law concerning the enforcement in *F-2* of an *F-1* alimony decree. The rule of the great majority of courts, restricting the wife to an action of debt with the attendant legal execution, is open to serious objections. If the *F-1* decree calls for periodic payments, suit can be brought in *F-2* to recover only those installments which have accrued. If the husband continues his delinquent ways, a multiplicity of suits is inevitable. A long and, in some cases, a disastrous delay may result during which the wife and children may suffer untold hardship. The law side of the calendar often is badly overcrowded. Even after a judgment has been secured against the husband, execution must issue, and this involves the discovery of some property of the husband on which levy can successfully be had. If his assets are of a liquid character, they can easily be concealed, or the husband can flee the jurisdiction of the *F-2* court, as he had formerly done in *F-1*. Furthermore, the law gives the wife no protection as to the future. Each time a payment falls due she must take legal action.

That the legal remedy is inadequate would seem self-evident. The ordinary *F-1* money judgment calls for the reimbursement or compensation of the plaintiff. In this situation of little social consequence, the action of debt is fairly satisfactory. But an alimony decree providing for the vital necessities of wife and children presents an entirely different picture.

To say that alimony is a debt of record and enforceable only at law because the legal remedy is adequate and complete is entirely unrealistic. As before pointed out,[136] the expression "debt of record" was adopted as a convenience in order to signify that an equity decree was a judgment capable of supporting an action of debt. As it has turned out the phrase has been unfortunate. Certainly alimony is much more. From the standpoint of society the husband's duty, strongly guarded as it is in *F-1*, with the full vigor of equitable enforcement, should not to such a large extent be dissolved by his crossing a state line. The legal attributes of alimony vary greatly from those of an ordinary money claim. Clearly the effective enforcement of the obligation to support should not be denied merely because it is labeled a "debt." It is no bar to the exercise of equitable jurisdiction that *F-1* alimony orders have long been dealt with in *F-2* by legal action.

The courts of *F-2* say again and again that the full faith and credit clause requires them to give effect to the *F-1* alimony decree. This means, according to them, the recognition of such a decree as a debt. Technically, under the theory of *stare decisis*, this is the law. But no decision of the Supreme Court has held that more cannot be done. It is, of course, true that the modes of enforcement available in *F-1* are not, under the full faith and credit clause, binding in *F-2*. But *F-2* is not asked to enforce the *F-1* decree, but to establish it as a judgment of its own. The language in *M'Elmoyle v. Cohen*[137] that a judgment "can only be executed in the latter state [*F-2*] as its laws may permit," in no way prevents an alimony judgment from becoming an equity decree in *F-2*. The problem is not one of full faith and credit, that is,

[136] *Supra* note 42. [137] *Supra* note 23.

not whether *F-2* is compelled so to act, but whether on the grounds of comity adequate protection should be given the wife. It follows logically from this that the equitable remedies in *F-2*, if there are any, should, therefore, be available to the wife. True, *F-2* should not give the alimony decree greater effect than it would have had in *F-1*. But the equitable relief in *F-2* is a matter of discretion and in this way adequate protection will be given.

The alimony decree along with the effective enforcement thereof are important not only in *F-1*. Adequate remedies in *F-2* can be provided only through enforcement in a court of equity with its vigorous sanctions, or by statute. Only in this way will an alimony order serve its function nationally.

The California, Washington, Oregon, Minnesota, Mississippi and Connecticut courts have of late indicated a willingness to look upon an *F-1* alimony judgment as more than a mere debt of record. They have made the decree a judgment of their own courts. This forward step is fundamentally sound and is based on proper grounds of policy. New York has done much the same thing by means of legislation. Some such steps are necessary, even imperative, if an alimony decree is to have national consequences.

PRACTICAL PROBLEMS IN THE ENFORCEMENT OF ALIMONY DECREES

EDWARD POKORNY*

In one form or another the word "alimony," insofar as its import is considered by some lawyers and laymen, contains the sinister idea that it relates solely to the support of worthy and unworthy ex-wives. The common-law definition given by law writers of the term "alimony" is perhaps not broad enough to include provision for infant children of the parties to a divorce. Yet the authors state that some of the statutes and decisions give a broader meaning to the term.

It has been held in Michigan that when the legislature passed the alimony statute it intended to provide a sum to be paid to the wife by the husband for the support of the wife and such children as should be placed in her custody and that this sum, which the statute contemplates is to be paid to her from his estate for her own or children's support, or both, is called "alimony" in the statute and must be treated as such.[1]

In the State of Michigan, the Wayne County Circuit Court, having jurisdiction in divorce matters, recognized the fact that its alimony decrees were not being very regularly complied with, resulting in distress to the dependents and often compelling them to go on public relief. This court was instrumental in presenting a bill to the legislature creating the office of "Friend of the Court" whose duties, defined by the statute,[2] are to examine records and files in divorce cases where decrees have been rendered for the support of dependent minor children and to bring into court when necessary by citation or otherwise all persons who are delinquent in making such payments. In the County of Wayne, Michigan, with a population of close to 2,000,000 the average monthly divorce decree rate for the past nine years—1930 to 1938, including depression years when the divorce rate went down all over the country—was 415. In close to 40 per cent of these cases the decrees order support for minor children, and in approximately 3 per cent, for childless wives.

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[1] Brown v. Brown, 135 Mich. 141, 97 N. W. 396 (1903); Kutchai v. Kutchai, 233 Mich. 569, 207 N. W. 818 (1926); West v. West, 241 Mich. 679, 217 N. W. 924 (1928).

[2] MICH. COMP. LAWS (1929) §12783.

The office[3] deals with thousands of men who, having solemnly sworn, when pronouncing their marriage vows, to take their spouses for better or for worse and then having discovered it was all for the worse, suffer some kind of mental reaction in relation to their family responsibilities which makes them fugitives from justice. They become chronic alimony delinquents and rather than be continuously harassed either by their ex-wives or the law, leave the state of their domicil thinking they are forever free from their moral and legal obligations. Such persons may be extradited by virtue of the Michigan statute which makes it a felony to leave the state and fail to support a minor child or children under 17 years of age.[4]

To expedite the hearing in this type of alimony prosecution a criminal warrant is applied for, and, when the defendant is returned to the state awaiting a hearing in the criminal case, he is taken to the circuit court on a writ of attachment and hearing had immediately.[5] This eliminates the time which would otherwise be taken in appearing before the magistrate and being bound over for trial in the criminal court.

In many cases after the entry of the divorce decree the social status of one or both of the parties changes. The ex-husband is steadily employed, pays his alimony for the support of the children regularly, visits them in accordance with the privileges granted to him in the decree. He begins to tire of a life of solitude or celibacy. He decides to remarry. This act embraces many unforeseen happenings. The ex-wife either becomes jealous or doesn't like the new wife who usually accompanies her

[3] The organization of the Friend of the Court consists of the executive, eight assistants, sixteen investigators, two deputy sheriffs, a cashier's department of seven, ten stenographers, a docket clerk, a messenger clerk, a telephone operator, and an information clerk.

The Rules of the Circuit Court of Wayne County define the procedure in divorce, separate maintenance, or marriage annulment cases with reference to this office. All praecipes giving notice of motions in such cases must be filed with the Friend of the Court who is appointed Deputy County Clerk for that purpose, and all motions must be referred to him for investigation and recommendation before being passed on by the court. Objections to the Friend of the Court's recommendations must be served upon his office and upon counsel for the opposite party at least one day before hearing. The Friend of the Court is responsible for the enforcement of all preliminary and interlocutory orders as well as final decrees in such cases. Rule 7.

All payments of alimony whether temporary or permanent, must be paid to the Friend of the Court. Rule 9(a). In all divorce cases where the wife is served either by publication or by registered mail, the decree must expressly reserve the question of alimony for disposition in the event the wife applies therefor in the future. Rule 9(b). The latter rule protects the wife who has had no actual notice of the divorce proceedings.

In every case where no answer is filed, the Friend of the Court is required to examine the file and pleadings and to file a written report showing any defects that may appear in the pleadings, serving a copy of his report on the attorney for the plaintiff or the cross-plaintiff. Moreover, no such case shall be assigned for trial until the Friend of the Court has certified to the Assignment Clerk that no jurisdictional defects exist in the pleadings, noting any amendable defects that may still exist therein. Rule 6(a).

The file and pleadings in such cases, together with the report of the Friend of the Court, must be filed with the County Clerk at least four days before the day set for hearing. If the opposite party has appeared by counsel, four days' notice of the hearing must be given to counsel. Where, however, there is one or more children under 17 years of age, or where the wife seeks alimony for herself or maintenance for the children, notice must be given to the Friend of the Court by the party seeking the relief at least three weeks before the final hearing. The case may not be heard until the Friend of the Court has filed a final report including any recommendations made by him as to alimony and maintenance for children, stating the specific amount, if any, recommended by him. Rule 6(b).

For a more detailed description of the office of the Friend of the Court, see MICHIGAN JUDICIAL COUNCIL, FIFTH ANN. REP. (Aug., 1935) 61 *ff.*

[4] MICH. COMP. LAWS (1929) §12781.

[5] Riegler v. Kalamazoo Circuit Judge, 222 Mich. 421, 192 N. W. 690 (1923).

husband when he visits the children and, if the children are taken to the father's home, the mother's imaginings are limitless. The ex-wife, letting her evil thoughts dominate her, begins a course of conduct which materially affects the rights and privileges granted to the husband in the decree. His reaction reaches the point where he decides that if his ex-wife refuses to comply with the terms of the decree, he will do likewise, and refuses to support the children. This is one of many practical problems in the enforcement of alimony decrees. An experienced officer from the Friend of the Court's office interviews the parties, ascertains the cause of the difficulties and attempts to adjust them. The officer, in the interest of peace and harmony, may deem it necessary to be present at the home of the ex-wife when the ex-husband calls to visit the children or temporarily take them away. The parties' knowledge that an unbiased officer of the court stands ready to investigate complaints, ascertain the facts, and if necessary, initiate contempt proceedings acts as a deterrent to those who are prone to disregard others' rights and the orders of the court.

It is not an uncommon situation for the ex-wife to remarry and should the new husband be of a sensitive disposition and possessed of a strain of jealousy, the step will usually lead to misunderstanding and defiance when the first husband and father of the children calls at the home to visit them. Even though the ex-wife may have no contact with and may not even converse with her former husband, nevertheless the new status creates an atmosphere of unfriendliness which frequently develops into a very hostile attitude. Under these circumstances, only the slightest provocation is needed to call forth remarks of a very offensive nature. Frequently the next step is a declaration by the new husband that the father of the children cannot call at his home to visit them and the father will then retaliate by declaring he will not support them. Such a situation requires tact upon the part of the court officer in bringing the parties to a better understanding. Should our efforts fail, the case goes to court, usually on an order to show cause on the part of the wife against the husband for failing to support the children, and an order to show cause by the husband charging his wife with violating the provisions of the decree relative to either visitation or temporary custody of the children. If the parties are still belligerent when they appear in court and refuse to respect and obey the terms of the decree, a threatened jail sentence usually restores them to a more normal frame of mind.

As I have stated heretofore, the social status of a divorced couple frequently changes after decree. We have had cases where the wife, having remarried, contemplates changing her residence to that of another state and proposes to take her minor child with her. The ex-husband, being domiciled in the state granting the decree, strongly objects to the change of residence of his child whom he is supporting. He contends that the court has granted him visitorial and custody privileges and that removal from the state will destroy contact between father and minor child. Under these circumstances, where the mother unquestionably is a fit and suitable person, it is extremely difficult to take the position that she shall not remove the child out of the jurisdiction of the court. In order to legalize the contemplated change, the ex-

wife files a petition for modification of the decree praying for an order permitting her to change the child's residence. The court has established the practice that where the mother is of good moral character and has a suitable home for her child, she will be given its custody. If reasonable provisions can be made for the temporary custody of the child during school vacations and holiday periods, an order entered in the lower court approving them will not be disturbed on appeal.[6] In the event that the mother living in a sister state should refuse to comply with the Michigan decree of divorce, the husband's remedy would be by petitioning a court of the mother's domicil for a writ of habeas corpus for a determination of the respective rights of the parents.

In thousands of cases handled in our department we have recognized a group of alimony recipients who are the beneficiaries of an order for the support of the mother and child or children and are wholly dependent for their sustenance upon payments made thereunder. Under the order of the court the alimony is payable to our department. This practice enables us to determine definitely whether a delinquency exists. Human nature has its weaknesses and these, it seems, frequently affect alimony payers, causing them intermittently to miss weekly alimony payments. This delinquency creates a serious economic upset in the routine life of the mother and children and a complaint is promptly made. One of two things must be done immediately—obtain an emergency relief order from the welfare department or dispatch an investigator to the place of employment or home of the alimony payer. If no money is obtained from him, an emergency order is requested and if the delinquency is not made up on his next pay day, he is cited to appear in court on a contempt charge.

One of the most disturbing problems in the enforcement of alimony decrees arises in the cases where the husband remarries and produces a second set of children. Being a common workman, receiving ordinary wages, he finds it impossible to contribute to the support of the children of the first marriage. It is difficult by argument or reasoning to change his mental attitude of utter lack of capacity to support the first children. From an economic point of view, he may be right. However, the legal responsibilities fixed in a divorce decree cannot be disregarded. The law must be upheld. This type of case is not easily solved, notwithstanding the father's claim of sincerity and his promise of future support when he is threatened with prosecution. We had a case where one child was born of the first marriage and four of the second marriage. For years the father refused to support his first child. We were unusually lenient and generous towards him in trying to get him to change his attitude. When all efforts failed, one course remained—prosecution for contempt of court. He defended on the ground of total incapacity because of new family obligations. The lower court held that in this situation the child of the first marriage had a priority over the second group, largely for the reason that the father's obligations were adjudicated when the decree was entered and any marital contractual relation entered into by the father thereafter became subject to the rights of the first child. The lower

[6] Epstein v. Epstein, 234 Mich. 200, 207 N. W. 894 (1926).

court was extremely lenient with the respondent and committed him to jail for a period of six months, to be released upon the payment of fifty dollars. His attorney filed a petition in the Supreme Court for a writ of habeas corpus and certiorari. The Supreme Court held that the action of the lower court was justified by the record and dismissed the petition.[7]

There are many decrees of divorce entered where the children are of tender age. Weekly payments for the support of the minor children is ordered, based upon the financial capacity of the father. These alimony decrees ordinarily run until the children become emancipated or self-supporting. It is to be expected that economic conditions will interfere with the father's capacity to contribute towards the support of his children, by reduction of wages, part-time employment or lay-offs. When the fact of such an interruption in his income is established, the father obviously is without capacity to contribute and if the dependents are without means, welfare relief must be applied for. To prevent any injustice to the father, the divorce decree should be modified to meet the new situation. This course frequently is delayed for financial reasons. So long as the decree remains unmodified, the alimony continues to accumulate and in time reaches a sum wholly beyond the capacity of the father to pay. The accumulation is a factor that can be very troublesome to the father because it encourages unwarranted action upon the part of an unfriendly ex-wife. There are occasions when alimony has accrued to a sum exceeding one thousand or two thousand dollars and, upon application for modification, the ex-husband usually prays for an order cancelling the accumulation. Upon investigation we attempt to obtain accurate information as to the period of unemployment, part-time employment, and reduced wage income. In our state the court has authority to readjust alimony payments retrospectively and determine the amount the ex-husband should or should not pay with respect to the periods when he was without capacity.[8]

The solution of some of the problems involving enforcement of alimony decrees are comparable to a hairline decision made by a baseball umpire—he calls the play as he sees it. For example, a decree of divorce was entered in a certain cause where no minor children were involved. The husband was ordered to pay $50.00 per month permanent alimony for the support of his wife. The wife previously had been married and had an adult son who married and had one child. The son did not get along with his wife and a decree of divorce was entered in his case ordering him to pay $50.00 a month for the support of his minor child. Thereafter, his stepfather married his ex-wife. The son and his mother moved to another state where he obtained employment and is supporting his mother but is not supporting his own child. His stepfather is supporting his child. The childless ex-wife complained that her ex-husband was not paying $50.00 a month for her support. The ex-husband countered with the claim that he is supporting his former wife's grandchild to the extent of $50.00 a month and that one set of circumstances should offset the other. I ask the

[7] Lupu v. Deniston, 285 Mich. 500, 281 N. W. 236 (1938).
[8] Loomis v. Loomis, 273 Mich. 7, 262 N. W. 331 (1935).

question—what would the reader do under these circumstances with respect to enforcing the alimony provisions of the two decrees?

We made a partial study of 189 contempt cases presented to the court for nonpayment of alimony. In 160 cases there were minor children and in 29 cases, no children of the marriage. The following table shows the number of prosecutions for non-compliance of alimony orders:

Cases	*Prosecutions*
108	1
29	2
20	3
7	4
8	5
8	6
4	7
2	8
1	9
1	13
1	20

Upon hearing these cases, the court, depending on the degree of contempt shown, may enter an order placing the respondent on probation, may require him to pay a certain sum of money or stand committed, or may dismiss the case.

The controlling factor in alimony cases is wage income of husband. The most satisfactory evidence is presentation of employer's wage records. There should be no difficulty with the employer in obtaining this voluntary information when the reasons are fully explained to him. His certification of the wage records at the time of hearing of the case in court is rarely disputed by the defendant. The employer who refuses to give any information may be summoned into court on a subpoena *duces tecum*. This involves annoyance and loss of time and knowledge that such action can be taken may be the means of obtaining the information sought without appearance in court.

The claim by the husband that he is unemployed and without means to pay is not always a bar to obtaining some money for the dependents. In states having unemployment compensation (Michigan, for example, pays $16.00 a week for 16 weeks) a sufficient showing may be made of capacity to comply with the alimony order in whole or in part. We believe it can be successfully argued that it was within the contemplation of the creators of this relief that the workman's dependents should share in its benefits.

In the Third Judicial Circuit comprising Wayne County, Michigan, there are eighteen circuit judges to whom in rotation are assigned alimony motions, orders to show cause and divorce hearings. Interlocutory orders and decrees are entered. By court rule the judge who entered the order retains jurisdiction and must hear all proceedings to enforce the terms thereof. This procedure gives the judge a better

understanding of the problems involved and with the assistance and information given by a court officer, he can more satisfactorily dispose of controversial matters.

In the enforcement of alimony orders and decrees by contempt proceedings, personal service of a copy of the order and petition is mandatory. The respondent may be temporarily absent from home or, due to the nature of his employment, he may be difficult to serve. In our circuit we found that the process server was losing a lot of time making one or more trips to serve the papers. We believed that most of the men were not deliberately avoiding service, but due to certain circumstances could not easily be found. We tried the plan of mailing the papers to the last known address. In 1938 we instituted 1,433 contempt proceedings, serving by mail. In 95 per cent of the cases the respondent personally appeared in court to answer the order to show cause. In the cases of non-appearance, the petition and order to show cause are dismissed for want of service. We then determine whether to apply for a writ of attachment or order to show cause and obtain personal service.

In 47 of the 48 states and the District of Columbia the courts have the statutory power to grant divorce decrees, either *a mensa et thoro* or *a vinculo*. The problem under discussion of enforcing alimony decrees in divorce cases is general. Undoubtedly, different ideas and systems prevail. Probably one of the most common factors involved is the inability of alimony payers to adhere rigidly to the cost of living within a definite or limited income. Rare is the man who claims he has no creditors. It is easy to say that the rights of the wives and children are paramount to creditors, but that will not stop a creditor from commencing suit and garnisheeing wages. There is an opportunity for judges and court officers to work out a plan of budget supervision. With the cooperation of the husband, a plan could be arranged whereby his pay check would be delivered to the court officer who would award a certain sum to the husband for necessary living expenses, a portion to the wife for the support of herself and children, and the balance allocated to creditors on a percentage basis. The creditors, even though they receive a small part of their bill, should not object provided payments are made with regularity.

I believe that the problems discussed in this article will be of more interest to the reader if there is included herein a few illustrative cases.

ILLUSTRATIVE CASES

I

Facts: A decree of divorce was entered requiring the defendant husband to pay $8.00 per week for the support of two minor children. A short time later, the man remarried and he now has three children by his second marriage. He is employed and his income averages $25.00 per week.

The first wife insists that he obey the order of the court to pay for the support of the children of the first marriage. His second wife insists that her children are equally his responsibility and should have proper care. The husband pays a smaller amount than ordered, claiming it is impossible to pay more due to the fact he must pay rent, necessary household expenditures, clothing, etc. He states he is doing everything humanly possible

and is unable to earn more money; that he realizes his obligation; that he has reached the limit of his physical and mental endurance and can carry on no longer and would welcome a jail term for contempt of court.

Discussion: The problem is one which embodies not only the legal enforcement of this order but also the social consequences of the enforcement. If this order is enforced to the full extent there is no doubt that his present home cannot be maintained and that the children of his second wife would suffer greatly for lack of the vital necessities of life. If the order is not enforced, then the two children of his former marriage will be denied the much needed financial assistance of their father. Which way shall the pendulum of justice swing? Either way, innocent little souls will suffer.

It is a simple matter to lose sight of the legal principles involved if the social aspect and consequences are considered. What is the solution of this grave and important question? It is possible that as civilization advances this problem will be ultimately decided, but, on the other hand, it may never be decided because man is mortal and subject to the frailties of human nature.

II

Facts: A decree of divorce was entered ordering the defendant husband to pay $25.00 per week for the support of the plaintiff wife and minor child, aged sixteen, to continue until the child attained the age of eighteen years or upon the remarriage of the plaintiff wife.

The husband paid regularly until his suspicions were aroused that his wife had remarried. An investigation revealed no legal marriage and no cohabitation to establish a common-law marriage. However, the woman and the alleged husband had executed a mortgage to a company and the woman signed her name as his wife. The woman explains her action by stating that she was not married; had never lived or cohabited with this man, but intended to marry him in the future and signed the deed upon the insistence of this man who stated it would facilitate the issuance of the mortgage.

Discussion: The plaintiff wife seeks the enforcement of the alimony order. For the sake of argument it is agreed that no marriage of any kind was ever consummated and the only evidence is the mortgage bearing the woman's signature as the wife of another man. The solution of the question simmers down to the following conclusion: If she is not married, then she has perjured herself and committed a fraud upon the mortgage company. If she is married, the order is unenforceable. The legal entanglements into which this woman permitted herself to become involved can be discussed to no end, but enforcement of this order by the wife will give the husband an opportunity to prove that she has changed her social status.

III

Facts: At the time the decree was granted in this case, the man, Mr. *X*, had a good position with the *Y* Corporation. There were no minor children involved, but an order for $12.00 a week permanent alimony was entered. This alimony was paid each week regularly. Suddenly, about May 1, 1938, through an unexpected turn of affairs, this man found himself out of employment without fault on his part. The move being entirely unexpected, he had no opportunity to arrange his affairs and except for a few dollars in petty cash, he was without funds.

Mrs. *X* discovered this when her check failed to arrive punctually and immediately made a complaint to our office. Mr. *X* reported promptly, advising us of the circumstances, admitted his obligation to pay the full amount of $12.00 per week, and promised to make up all arrearages as soon as he was able to get on his feet financially. In the mean-

time he was attempting to do work on a commission basis and made a few small payments out of these earnings. This did not fit into Mrs. *X's* concept of the situation. She had apparently been living on this income and making few attempts to adjust her finances so that she would be more or less independent. Regardless of circumstances, she felt that Mr. *X* should be required to pay by the courts. She therefore filed a petition for an order to show cause.

Receiving this petition, Mr. *X* realized the gravity of the situation. Upon being informed that Mrs. *X* was entitled to her day in court, he obtained the services of an attorney. This attorney immediately took steps to modify the decree and reduce the alimony. When the contempt proceedings came on for hearing, the man was ordered to continue paying as he had, according to his ability, until the hearing on the modification of the decree. The final outcome was the reduction of the alimony order to $6.00 per week and the man showed his sincerity by paying this sum regularly out of an income of only $16.00 per week.

Discussion: If this woman had accepted the situation she would have had the same amount of money coming in with benefit of an arrearage being built up that would undoubtedly have been paid when the man's financial situation improved. Her unwise action in attempting to enforce the court order in an impossible situation, resulted in a substantial loss to herself.

IV

Facts: A decree of divorce provides that a man is to pay $4.00 per week for the support of one minor child. He thereafter marries a woman with seven children. He is laid off at his place of employment and applies for welfare aid in the amount of $13.39 per week for himself, wife and her seven children. Subsequently, the man is given a W. P. A. job and earns $13.84 per week. His former wife has also remarried and insists that the man now pay as required by court order, claiming that her child comes before his stepchildren. He states he cannot pay as he owes certain bills to credit houses and for electricity, gas, etc., and also that he does not make enough to support his present family with all the necessities of life. He further states that if he is forced to pay, his present wife will leave him.

Discussion: This case presents essentially a social problem. When this man was obtaining welfare aid, he was not in contempt of court as he did not have capacity to pay. Now that he is employed, he earns approximately the same amount as was given him as welfare aid and yet he may now be in contempt. No doubt this W. P. A. job was given to him by the welfare agency so that it would not be required to assist him and his family. If he is required to pay for the support of his child as required by the decree of divorce, this will defeat the purpose for which he was given this job.

If he complied with the order, he would not have enough to support his present family and they would receive no help from the welfare agency as the man is employed. From this it appears that his compliance would cause the separation of the family. If the rights of the first child are given preference over those of the stepchildren, no more than a dollar or two a week could be obtained.

SOCIAL AND PSYCHOLOGICAL EFFECTS OF THE AVAILABILITY AND THE GRANTING OF ALIMONY ON THE SPOUSES

CATHERINE GROVES PEELE*

It is not surprising that generally there is much emotion associated with the giving or receiving of alimony. Alimony perpetuates, in most instances, a relationship passionately undesired and in a way that continues and even increases former antagonisms. Although we can safely assume that the average individual will react emotionally to an alimony decree, it is difficult to know in advance what slant this will take, so many elements are involved. It easily becomes a sort of legal poultice that draws to a head the underlying domestic poison that the divorce is expected to drain away.

Naturally, of first importance in determining the reaction spouses will have to the matter of alimony is their existing attitude toward each other. Other things that have to be taken into account are: the individual's viewpoint on alimony in general, his attitude toward legal proceedings of any kind, and his feeling in regard to money. These various factors can not be isolated. One often reenforces another. Thus, a man who harbors a great deal of resentment toward his wife for her part in bringing about their separation, will become convinced that it is most unjust to expect a man to continue to support an able-bodied woman after he has separated from her, and will in the end become antagonistic toward the court which forces him so to do. Such a man may put up a tremendous fight to keep from paying alimony in spite of the fact that his friends try to get him to see that he is losing more in prestige by his contest than he can ever gain if he wins.

Alimony is a concrete thing around which all the feelings concerning the divorce or separation are likely to gather. To the man who has always told his cronies how extravagant his wife is, the amount of alimony she demands is proof that he is right. To the woman who keeps her bridge club up-to-date on instances of her husband's inconsiderate behavior, his attitude toward giving her alimony is the most flagrant example of all. Also, alimony goes on after the divorce suit has been settled. Animosities that might otherwise have burnt out with the passing of time may be

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rekindled each time a check is mailed. The memory of other wrongs may fade, but the husband may find the paying of the alimony a constant source of annoyance, while the wife may be irritated each time the check arrives because it is no larger.

Another thing that has to be considered is that the payment of alimony is not a thoroughly accepted thing throughout our society, appearing mainly in cases of divorce or separation among those in the higher economic groups, seldom in those among the lower. Therefore, although alimony may be taken for granted in certain circles, it can not be said to be so regarded among the public as a whole. In general, alimony in cases of separation or divorce seems to be the accepted thing among those whose economic status is such that the wife usually has some property of her own at the time of marriage. It is not as accepted in those groups where the wife seldom adds more to the economic aspect of the marriage partnership than her own wage-earning ability.

Thus a man who would expect legal means to be taken to force him to pay off his creditors, to give his employees their wages, and to support the wife with whom he lived, may take a very different attitude toward the payment of alimony, and he may be backed up in his resistance by the opinion of his friends.

This attitude toward alimony is in contrast to that toward a man's duty to support his legitimate minor children, whether he is still living with their mother or not, for whether a man be rich or poor, public opinion almost universally condemns him for not accepting such responsibility to the best of his ability. The following is an example of the difference in the general attitude toward the matter of a man's supporting his wife and of his supporting his children in cases of divorce or legal separation, and this attitude is familiar to any social agency dealing with such situations.

A man deserted his wife and eight children and moved over a state line to a near-by city where he had had steady work for years. His income was adequate but he gave only spasmodic support to his family. His wife, who had poor health and whose children were all of school age, went to court and was granted support for the children and alimony. Because the man resided in another state, however, she was unable to get the order of the court enforced, and as a result she had to call upon a relief agency for assistance in maintaining the family. In spite of this, the man's employer refused to tell either the wife or her lawyer what the man was earning, stating that he intended to remain neutral in the situation.

Then one of the children became involved in a minor delinquency and was referred to a children's agency. When the case worker from this agency visited the employer his attitude was entirely different. He had not felt under the slightest obligation to make the man contribute to his wife's support, but if the children were suffering from lack of opportunities that more adequate financial means could supply, then that was a different story. The employer talked with the man and got him to contribute much more adequately, through the children's agency, to the support of his children. The man never has paid any alimony.

This is but one instance of a widespread tendency on the part of many people to protect a man against a support-seeking wife from whom he is separated or divorced.

There are several things which may lead to this attitude, one being the modern conception that an able-bodied woman, if not burdened with the care of young children, should be capable of being self-supporting. Another is the idea, quite commonly held, that a woman should receive alimony only if she were the innocent party in the divorce proceeding, and so, while many men feel that in most instances a man should allow his wife to be the plaintiff in divorce cases, they may feel that it is very unfair for him to have to pay for his chivalry by being made to provide alimony.

Women, too, often look with suspicion at the motives of the members of their sex who accept alimony. As marriage is thought of less and less as an institution with important economic functions and more and more as a partnership between congenial persons of opposite sex, and as women come to compete more and more on equal terms with men in the industrial world, it is but logical that people should question the right of women to receive alimony merely because they are women. The most striking example of this change in attitude is exemplified by those states which have laws making alimony payable to either spouse.

The effect of this non-acceptance of alimony in many quarters is clearer than its cause, however, for the effect obviously would be to increase a man's resentment over having to pay alimony and a woman's guilt about receiving it. Therefore, to understand a person's reaction to the payment of alimony, one has to take into account the attitude toward alimony in the person's social circle. An individual from a higher economic group may accept the principle of alimony as a matter of course, while another man with a different background may reiterate that he will support his children as best he can, but that he will not give his former wife a cent.

A woman who had been separated from her husband for a number of years had eked out a living by adding what she earned as seamstress to what she received from her husband for the support of her two children. However, when the younger of the children reached the age of sixteen (the age at which payments for support of the children ceased) she found it impossible to make ends meet and so she applied for relief. When she was told that it would be necessary for her to sue for alimony before being eligible for assistance, she was insulted. Never, she insisted, would she take money for herself from a man she detested as she detested him. In the case of the children it had been a different matter, a man should support his children, but for her, a grown woman, to ask for support was merely begging, and she was not going to beg him for anything. The man, when he heard about the controversy, soon settled the matter by giving up his job and disappearing.

Whatever a person's attitude toward alimony in general may be, there are elements in the legal procedure involved that tend to arouse emotional responses. It constitutes an exercise of legal authority, and whatever an individual's reaction to authority may be, his reaction is likely to be increased when he experiences pressure from a court. He may become incensed at this intrusion of an outside force into his private life, or he may become surprisingly docile in spite of vehement remarks that he had previously made as to what he would do and what he would not do.

We Americans, with our frontier traditions that we have not yet outgrown, generally react adversely to the idea of being ordered by a court to do anything, even

something that we agree should be done. This reaction is often evidenced in alimony proceedings, being thrown into relief because, as has been pointed out, the idea of paying alimony often is not as generally accepted as other types of payment which the courts enforce.

The reaction to the legal procedure itself will of course vary widely in accordance with the previous experience and the temperament of the individuals involved. On the one hand, we have the corporation official who is used to numerous legal restrictions in his business and accustomed to dealing with lawyers, to whom the order to pay alimony may mean little more than the need to tell his secretary to remind him to make out an additional check on the first of each month. On the other, we have a mill foreman, who also separated from his wife on amiable terms, but who has never been in a lawyer's office except to have his will drawn up, and who has never been in a court room before his divorce suit is heard. To this man, the order to pay alimony may seem such a threat of continuing compulsion that he gives up his job, leaves the state, and is never heard from again. Between these two extremes we find all types of reaction to court orders in divorce cases.

Some even decide that they will go back and live with their spouses rather than obey the demand that they pay alimony. Thus, one man who had been threatening for years to leave his wife, accusing her of being ill-tempered, a constant nagger and extravagant, and who had finally separated from her, went back to live with her the day after he was ordered to pay her alimony. His argument was that if he were going to have to pay alimony in addition to having to pay board elsewhere, that it was more sensible to live at home, and he seemed to think triumphantly that in going back to his wife he had put one over on the court. He was a thrifty soul and for a woman to be able to get his money without having to do anything in return for it was contrary to his sense of justice.

This would not appear to be the basis for a congenial marriage, but doubtless in many of these separation cases, where the husband says he returned to his wife rather than pay her alimony, this statement is merely a face-saving device on his part. Having publicly announced that he was leaving her, he has found that in spite of all her faults he wishes that he were home again. Being ashamed to admit that he wants to return, he becomes rabid on the subject of alimony and so concocts a plausible excuse for going home without having to admit that he wanted to do so all along.

In addition to the feeling that may be aroused against the court as a source of authority, the legal procedure necessary to the securing of alimony tends to intensify whatever feelings the spouses have toward each other. This would naturally be so, since even when a settlement has been agreed upon informally between the two of them they generally approach each other as at least mild opponents, each with his or her own lawyer, when it becomes necessary to go through a court procedure in order to make the agreement legal. When, on the other hand, ill feeling exists between the two, it will not only increase while they clash over the terms of the settlement, but it

may be stirred up again by the efforts of one or the other to change the terms from time to time.

For the spouses to have to go through the motions of being combatants, which is so often necessary in divorce trials, may stir up belligerent impulses that heretofore had been absent. An individual who, on separating from his spouse, has come to an equitable decision as to the division of property, may, on finding himself a litigant in a court room, have a sudden urge to try to win the case by getting some concessions, or may, in a panic, fear that his spouse will try to gain more than was agreed upon. These contests, which in some cases seem to be generated by the procedure itself, may result in lasting antagonism between the two involved.

A man of ample means, who was estranged from his wife but who did not believe in divorce, decided to get a legal separation. He and his wife, who had an income of her own, had no difficulty in reaching an agreement as to the terms of the property settlement. The wife brought suit and in the midst of the private hearing before the judge the man, much to his lawyer's surprise, objected that the property settlement was unfair to him. Afterwards he stated that as he had sat there listening to his wife's statement of her reasons for not living with him, it had all sounded so much worse than he had expected it to that he had become fearful, all at once, that if he did not fight back, his wife might be awarded more than he had agreed to give her.

Another thing that has to be taken into consideration in any discussion of alimony is that most of us have strong feelings about the giving or receiving of money, and these stand out in transactions as emotionally tinged as those dealing with the giving of alimony to or receiving it from a former spouse. Generally money has meaning beyond that of its value as a medium of exchange. It represents power, not merely the power to purchase things but the power to purchase the services of others. It also represents prestige, for it symbolizes achievement, and many estimate themselves in comparison with others whom they know in accordance with respective earning power.

Psychologists have shown us that in our civilization at least money has come to be a tangible substitute for intangible things that a person may feel that he lacks. Being unable to gain the things that he really wants, such as, for example, ability to mix with ease with a group of his own sex, he collects money as the only way of compensating himself for this deficiency.

It is no wonder, therefore, that the paying or receiving of alimony may cause such strong emotional reactions merely because it means that money will pass between two people who already have built up a deep-seated emotional relationship to each other. It is difficult to generalize when speaking of these reactions, people vary so greatly, but perhaps in general it may be said that men react in one of two ways to the idea of paying money to a woman from whom they are separated or divorced. If the man believes that his wife was in the wrong and was almost solely to blame for the ensuing separation or divorce, he will often resent having to pay alimony, especially if the woman has means of her own, has no small children, or is thought by him to be capable of earning her own living. If he allowed her to get an uncontested divorce,

because he thought that was what a gentleman should do, then in addition he may feel that he was cheated. Such a man pays alimony grudgingly and may become increasingly embittered. This feeling is increased to the extent that money is of prime importance to the man either for what it can buy, or for the standing that it gives him in the eyes of others or himself.

If, on the other hand, the man has a guilty conscience and secretly thinks that he was at fault and that his behavior was the cause of the marital break, the paying of alimony may constitute penance, and may justify him in his own eyes for what he did. Such a man will have a great inner need to pay alimony and may wish to pay more than he can well afford to pay, or may urge a reluctant ex-wife to accept it. It is as if he were saying to the world at large that after all he was willing to do the handsome thing by his former wife, and therefore he can not be greatly blamed for what he did. He thinks, as many people do, that the giving of money should be adequate recompense to anybody for anything that might have been done to them.

Or his guilt may not be involved in the manner in which the marriage tie was broken, but in the knowledge of what has happened to his family since then. One sees instances of men who put aside all thoughts of what is happening to the members of the families of which they were formerly the heads, and as a substitute mail a check. They pride themselves on providing liberal financial support and so hide the fact that they are refusing to assume any other responsibility. Thus, paying alimony, doing all that the court requires, may enable a man to feel that he has bought his freedom, when otherwise he would have had to feel that what was happening to his former wife or his children was some concern of his.

An adolescent boy came to the attention of the Juvenile Court after a minor escapade. His divorced parents both lived in the city and the boy had always stayed with his mother, who was promiscuous and over-indulgent to the boy. It seemed obvious that the home that she maintained was not a suitable one for him. On several occasions she had gone to the boy's father, who had remarried, in order to discuss with him the fact that the boy was becoming a problem to her, and each time the man merely offered to increase the amount of the check that he would send her the following month. When he was seen by a case worker from the Juvenile Court his first reaction was not to help in the formation of plans for his son, but to offer to meet any expense involved in any plans that might be made for him by the court. His attitude was that since he was supporting his former wife adequately, he should not be expected to concern himself with what sort of a home she maintained for his children.

Thus, to some men the paying of alimony means that they have the right to refuse to concern themselves further about their former wives. On the other hand, to others the making of alimony payments has an opposite meaning, and constitutes for them a reason for maintaining to some extent their former relationship with their families. A man who thinks of money as power and has no sense of guilt in connection with the marital break, may want to pay alimony as a means of retaining his authority in his former home. He may feel that as long as he is contributing regularly to his

former wife's support he has the right to demand that he be given a voice in the management of the household of which he formerly was a part.

A man who had religious scruples against applying for a divorce left his wife and three small children and went to live with another woman in the same city. When his wife sued for a financial settlement, the man said that he would give voluntarily each week more than the court could force him to pay, as his wages were quite small. His condition was that he be allowed to take the money to his wife each week himself, and the court advised the wife to accept this arrangement. For three years now the man has kept his part of the bargain, giving his wife her allowance even when it has meant that he has been financially very hard pressed himself—this according to the wife's own statement.

In spite of this the wife violently objects to his weekly visits, which often end in noisy arguments accompanied by the smashing of dishes. She feels that he is using his economic power over her to keep her under surveillance and to see to it that she is never able to build up for herself a life of her own, unconnected with his. She has become very antagonistic to the court, which considers her objections to her husband's visits as unwarranted in view of the amount of support she receives, and she states that, as soon as her children are all of school age so that she can leave them during the day, she is going to find work and move where her husband will not find her. To both the man and his wife, the support that he is giving her seems to mean but one thing, the fact that he has never had to relinquish his power over her.

Thus, the payment of alimony can be a symbol of power to both the man and the woman concerned, and this is probably the usual reason why some women state, as many do, that they will accept support for their children from the children's father, but that they will not under any circumstances take any money for themselves. Some women even go to such extremes as insisting on banking the money in the children's name rather than spending it for the family's living expenses, for which it may be greatly needed, lest they themselves might get some advantage out of the money so spent.

On the other hand, a woman may think of alimony as meaning power, not her former husband's power over her, but her power over him. She may cherish this power merely for its nuisance value, hoping that having to pay it constitutes a constant source of annoyance to him. Or she may know that as long as he has to pay alimony he can not afford to marry again, or to live in accordance with the style in which he would like to live. Her desire to punish him may be a much more important factor in her insistence on receiving alimony than is her need for financial support.

A woman came to a Legal Aid Society demanding that her divorced husband be forced to pay her alimony. Investigation revealed that the man was quite ill, had not worked in some time, and was being supported by his second wife. This made no difference to the woman, who did not question these facts but who insisted that he be taken into court anyway, and she became very angry with the agency when this was not done.

It would appear from the public's generally skeptical attitude toward women who seek alimony that this punishing drive is considered to be the almost universal motive for a woman's desire to get support from a former husband. It is not uncommon to

find that men who have been generally condemned in the eyes of their community for their treatment of their wives become suddenly the object of pity as soon as the wife gets a divorce and is awarded alimony. Legislators, too, seem to have assumed that women have more desire to punish than to get support, for what other basis could there be for laws which enable a woman to jail her husband or former husband for non-payment of alimony when we have long ago outgrown the idea that creditors should be allowed to imprison debtors?

Perhaps the wives who are out for vengeance make themselves the most conspicuous, but as a matter of fact a woman may be humiliated by the knowledge that she is receiving support only because of a legal decree as frequently as the man may balk at the threat of compulsion contained in the decree. Anybody who comes into contact with cases of separation and divorce knows that there are many more women who do without what they need rather than take legal means to force their former husbands to support them, than there are women who use the courts to harass their ex-spouses.

Then again it may be not a desire for vengeance that makes a woman resort to the courts more than perhaps is necessary, but a new-born sense of power. A woman who has always felt completely helpless as far as her husband is concerned may get her first taste of being able to hold her own against him when she uses the court to force him to pay alimony. Then, glorying in this newly gained sense of authority, she may continually threaten her former husband with this power of the court until he rises in open rebellion.

Nor does the woman always wait until a divorce is granted before using alimony as a threat, and there is no telling in how many domestic spats women tauntingly remind their husbands of the obligation to support them even though they should separate, which in the majority of instances of course they do not do. A few men, the type who grow up with the notion that the female represents a lower type of the human species than does the male, may treat their wives as more on a par with themselves on being thus threatened, for to such men women gain in prestige in so far as they have legal rights that they are not afraid to enforce. Also, some men, who value highly the things that money can buy, may put up with a great deal of domestic wrangling rather than try to support two households. However, in very few instances would the reluctance to pay alimony be a deciding factor in keeping a man from seeking a divorce or separation.

When one considers the woman's side of the question, however, alimony may be of prime importance. The effect of alimony is to give the non-income-producing spouse (who of course is generally the woman) a chance to decide on a divorce or separation without thereby having to relinquish all the economic rights that she would have as a wife.

If there were no alimony laws many spouses would reach a voluntary agreement as to division of property if they both desired the separation, but the existence of such laws gives the woman who desires a marital break more nearly the same ability to

achieve it in spite of her husband's opposition as a man has to get a divorce even though his wife may not want one. The mere right to sue for divorce would mean nothing to some women if they would have no way of procuring support, for economic reality may make it very difficult for a woman, if untrained and middle aged or older, to support herself in anything like the style to which she is accustomed. Having no provision for enforcing payment of alimony would be in some cases the same thing as allowing the man alone to decide whether there should be a divorce or not.

Thus, on the whole, alimony operates to place the woman on a more equal footing with her husband when a decision must be made as to the point at which they shall cease to try to live together as man and wife. There is no way of knowing how many of the women now receiving support from a former mate would have made another attempt to get along with their husbands if there had been no such thing as alimony, but probably the main effect of alimony on the divorce rate arises from the fact that it puts a premium on legal separations as against informal ones. Couples no longer wishing to live together, but with no desire to remarry, who might otherwise merely live apart without making public avowal of the fact, may take steps to make the separation a legal one in order to get the court's backing for the property settlement. In so far as this factor operates to increase the number of divorces, however, it does so without actually increasing the number of broken homes.

This is not to say that the allure of alimony never leads a woman to the divorce court; it may even have led her to the altar in the first place. Nevertheless, the number of women who marry very rich men, live with them a short period of time and then demand huge sums as alimony is certainly much smaller than their ability to make newspaper headlines would lead one to suppose. Their importance is mainly the influence that a few such instances can have on public opinion.

Indeed, so widespread is the idea that alimony is just another racket that it is not uncommon to hear people say that it should be done away with entirely. This, however, is an unsound conclusion. If alimony laws work a hardship in certain cases, it would seem that it should be possible to amend them so that the abuses could be done away with, rather than to let the defects blind us to the essential justice of the principle involved, that of making a fair division of the economic assets that a married couple have built up over a period of years. The only asset may be the husband's earning power, and whether or not the wife has directly or indirectly helped to increase this over a period of time, if she has spent the best years of her life at the job of being a wife she may have thereby reduced her own potential earning power considerably. If it were not for the fact that anything connected with the breaking up of a marriage arouses emotional reactions in most of us, we should probably look upon alimony in the same light as we do the procedure of dividing property among the former partners of a concern that is going out of business.

In both cases the aim should be to get as equitable a division as possible, considering all the factors involved. That an equitable division is a very difficult thing to

arrive at nobody would deny. The matter is complicated not only by these various emotional responses on the part of the man and the woman, responses inherent in the situation involved, that of forcing one of the parties to a breaking marriage tie to make a financial settlement with the other, but also there are often other persons whose claims have to be taken into account. The rights of the children have to be considered in setting the standard of living which the spouse who is to keep them shall be allowed to maintain, and if one of the spouses has remarried the fact that there is a second family makes the matter even more involved.

It is for these reasons that the laws governing alimony need to be carefully drawn and the provisions concerning its administration need to be carefully worked out, so that its purpose of bringing about a just division of property and potential earning power in cases of dissolving marital partnerships shall not be circumvented by those involved, whose natural impulse may be to try to use alimony as a bludgeon to punish the other spouse concerned.

Any discussion of alimony which pointed out all the things over which difficulties may arise would leave a very distorted picture if it were not also made clear that the fact that there are these potential sources of discord does not necessarily mean that any of them will be factors of importance in any particular instance. We read in the papers about the spectacular divorce suits of those who are in open conflict, and we see in our legal aid societies and family welfare agencies those who are finding it hard to adjust to their situation. In this field as in any other it is those who are in some sort of difficulty who come to the attention of the public, and we do not hear about those who work out the question of alimony in a mutually satisfactory way.

Most of us know some, however, who have reached a satisfactory solution in that the man, believing that what he is required to pay is just, finds security in the knowledge that he will not be called upon to contribute anything above the amount set, while the woman gains equal satisfaction from the knowledge that the amount that she is to receive has been determined by an impartial authority which will enforce its payment. If this outcome of an alimony proceeding is the exception, there would seem to be no reason why it could not come to be more nearly the rule if alimony could be treated as a business matter dealing with the sharing of mutual resources between the spouses involved, rather than as tribute to be levied on the guilty party by the innocent one, or, even worse, as charity to be exacted from the man for the benefit of the woman merely because he is a man and she a woman.

ALIMONY IN FRENCH LAW

L. M. MITCHELL*

The problem of alimony has not reached in France the acute point which it has attained in some other countries. The probable reason is that the increase in the number of divorces is not so startling here as elsewhere. However, it would be too optimistic to say that there is no alimony problem in French law. The courts of this country have had to adapt the law, as set down in the Civil Code of 1804, to new conditions. A considerable change has taken place during and since the nineteenth century in the economic situation of France. Mainly agricultural at the outset, French economy has become increasingly industrialized. At the same time real property, originally the most important form of wealth, and the chief concern of the Civil Code, has declined before many other forms of riches, grouped under the general denomination of *biens mobiliers* (movable property). Many such forms of property, as for instance the so-called "ownership" of intellectual production like scientific invention, were totally unknown at the beginning of last century.—During the same period, the increasing speed of means of transportation has given a new rhythm to the entire life of the country and a much greater importance to its foreign trade.—Then, about half a century later another change occurred: the appearance of woman on the economic stage and her increasing influence on the business of the country since the end of the nineteenth century. This evolution reached its highest mark during the war of 1914-1918 and just after. Since the economic depression, one may notice a regression in the business activity of women in France. In the legal field, however, the status of woman tends every day towards equality with that of man. On February 19, 1938, a law was enacted to abolish the sections of the Civil Code putting married women in the category of juridically incompetent persons. It is only in the political life of the country that French women are still denied any official participation. But in private life woman has become the assistant (if not the competitor) of man in the struggle for life. As a result of all these changes, there is a striking discrepancy between the letter of the law, as it stands in the wording of the Code Civil, and the law as it is applied in fact by the courts in matrimonial causes.

Since the codification of 1804, French courts have endeavoured incessantly to adapt the law so as to give better protection to the wife during a divorce or separation

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suit. The situation, as originally conceived by the legislator, left practically the whole management of the family funds in the hands of the husband. Only real property was efficiently protected by law. The situation grew more and more serious with the increasing importance of movable property in private fortunes and the courts used every device in their power to remedy this unsatisfactory state of affairs. One of the fields where they exercised their influence in the matter was that of the wife's alimony *pendente lite*. Their efforts tended to instil greater flexibility to law on the subject, so as not to leave the wife insufficiently provided for during the suit, while the husband retained management of the funds until dissolution of the marriage and liquidation of the marriage settlement. These efforts brought about some legislative reform.

The general economic depression has put another problem in the vanguard of legal difficulties. A divorce decree, or a judgment of separation may, in certain conditions, sentence the guilty spouse to pay to the other a permanent alimony. This alimony is estimated, of course, on the basis of conditions as they stand at the time of the decision. Courts are very often called upon at present to solve the technical difficulties which oppose the revision of this estimation, made necessary by an altered financial situation of either spouse. The difficulty is that the juridical basis for the grant of a permanent alimony is apparently different from that of alimony *pendente lite*, the very object of the decree being the destruction of the matrimonial tie. Therefore, permanent alimony appears to be more in the nature of damages for the loss by the innocent spouse of the right to claim support under Section 212 of the Civil Code. This leads to the application of the stricter rules of estimation of damages rather than the rules of estimation applying to allowances for necessaries between relatives, which govern alimony *pendente lite*. Yet it is impossible to overlook the fact that, at one time, there existed a marriage between the parties, since that is the very reason why the one may claim alimony from the other. Moreover, the general community is interested in the controversy. It is well known that the evolution of conceptions on the Family tends to consider it less as an aim in itself and more as a social institution. Therefore relatives are obliged to support one another, rather than let those in need fall on public charity. If the divorce leaves the ex-spouse with inadequate support, he or she may become a charge on the community. The solution of the controversy touches public policy.

In other words, and to sum up the problems raised by alimony, a twofold evolution has taken place in French law on the subject since 1804. One tends to remedy, by a judicious use of alimony *pendente lite*, some of the defects resulting in modern times from a conception of marital authority and property law dating from the beginning of the last century. The other is founded on the necessity to adapt the law of permanent alimony to a period of economic and financial crisis.

Alimony *pendente lite* is based on the obligation imposed on both spouses by Section 212 of the Civil Code to support each other. As long as harmony reigns in the home, this duty is performed by cohabitation, also one of the principal matrimonial

obligations in French law. But when suit is brought for divorce or separation, the first measure to take place, when all efforts at reconciliation have proved useless, is the assignment to the wife, by order of the President of the Court of first instance, of a separate residence. Apparently this measure affects exclusively the personal relations of the spouses. Yet, owing to French law of marriage settlements, it has necessarily most serious immediate consequences on their patrimonial relations.

Parties about to marry may choose between several *régimes matrimoniaux* (marriage settlements). If no express contract is made regarding their property, the legal patrimonial status, called the *régime de communauté* (community property) will apply. Under this form of settlement, virtually all the spouses' movable property becomes community property. To this fund must be added the income from the spouses' separate estates. The husband, naturally, has the exclusive management of his separate estate and also of the common fund. In consequence, he has the exclusive right to administer the separate estate of the wife, because the income belongs to the community of which he is the natural manager.—If the spouses, by an express settlement, have chosen to be married under the *régime dotal,* a special fund, the wife's dowery, is set apart. It cannot be disposed of, and the income is expressly destined to support the family. Here again, the husband is sole manager of the *dot.*—Even if the settlement rejects all community of interests *(régime sans communauté),* the spouses' property remains their own but, the income from the wife's being destined to the support of the family, the husband has a beneficial interest in it, called *usufruit.*—It is only if the adopted settlement is that of *séparation de biens* (separation of property) that the wife retains the management of her separate estate, under obligation, however, to contribute to domestic expenses up to one third of her income.

This brief synopsis of the French law of property of married people shows that in the great majority of cases the husband has in hand the larger part of available funds. And this rule applies until dissolution of the marriage. Thus, when the wife is authorized to have a residence of her own pending the divorce or separation proceedings, it becomes necessary to provide for her support, pursuant to Section 212 of the Civil Code.

The original conception of French law at the time of the Napoleonic codification provided an unwieldy procedure to solve this difficulty. When divorce, which was abolished at the time of the Restoration of the Monarchy in 1816, was again introduced in French law in 1884, it was followed, in 1886, by a law of April 18th which somewhat simplified the procedure. The plaintiff starts proceedings by an application to the President of the Civil Court of first instance in which he asks for leave to sue the other spouse. The President replies by an order summoning both parties to appear before him, and he may at the same time authorize the plaintiff to take a separate residence. The application and order are then served on the defendant. On the date fixed in his order, the President will try to reconcile the spouses. If the attempt fails, the President issues a second order to authorize the plaintiff to summon the defendant before the court. In this order, the President again decides on the

separate residence, the custody of children and also on the application for alimony. These various measures are known under the general denomination of "provisional measures" *(mesures provisoires)*. They are essentially temporary, at the discretion of the judge and immediately enforceable because of their urgent character.

When the plaintiff has availed himself of the President's authorization to summon the other party before the court, jurisdiction then passes to the latter, which is seized of the case by the statement of claim. From that date, the court has exclusive jurisdiction, as a rule, to revise the provisional measures. Nevertheless, proceedings before the whole court are always slow and rather complicated. And measures regarding alimony are often of an urgent character. In such cases, the party interested can avail himself of the procedure of *référé,* which is a simplified procedure before the President of the court in cases of emergency. In its decision of May 4, 1910, the French Supreme Court *(Cour de Cassation)* decided that this procedure is available in all cases of emergency, even after the court is seized of the case, provided the measures ordered by the President are purely provisional and taken without prejudice to the issue before the court. Such are orders on claims in alimony, which merely concern the maintenance of the spouse *pendente lite,* without prejudice to the question whether the court will ultimately grant a divorce and against whom. On this point, the excessive rigidity of the law, which does not expressly provide for emergencies after the divorce proceedings have started in court, has been remedied by case law.

If we now examine the legal characteristics of alimony *pendente lite* in itself, we are led to class it in the category of other allowances for necessaries attached by French law to certain family relations. In this respect it may be compared to allowances of Sections 203, 205, 206 of the Civil Code between parents and children, grandparents and descendants, sons- or daughters-in-law and fathers- or mothers-in-law, governed, as to their valuation, by Section 208. In other words, alimony *pendente lite* is a substitute for the matrimonial obligation of mutual support under Section 212 of the Civil Code. In consequence, alimony *pendente lite* may be granted without regard to the fact that the spouse in need may be the guilty spouse from the point of view of the ultimate decision on divorce or separation. It may be granted either to the wife or husband (although the former is the more frequent beneficiary because of the French law of marriage settlements already outlined); like other allowances for necessaries it is based on a reciprocal obligation, resulting from the family relation.

As to its valuation, alimony *pendente lite* is subject to the general provisions of Section 208: it is proportionate to the needs of the creditor and the paying capacity of the debtor. The needs of the creditor include all necessaries of life: food, lodging and clothing, and even the costs of the pending suit. They may include also family charges of the creditor such as children of a former marriage. On the other hand, all personal resources of the creditor must be taken into account. But the possibility that the creditor can get support from his or her parents is no defense for the debtor, because the reciprocal duty of support between spouses ranks first amongst such family obligations. Amongst the resources of the debtor, if it be the husband, one

must include the income from the wife's personal estate, if he administers it under the marriage settlement. It must be noted that alimony is chargeable on income only.

On the other hand, to determine who shall bear the ultimate burden of the debt, one must look to the final distribution of property on winding up of the marriage settlement. Under Section 252, the court's decision, so far as regards patrimonial relations between spouses, dates back to the day when proceedings were started. As a result, if the spouses were married under community property, the income from the personal estate of either spouse, of which the community has the benefit, will cease to fall in the common fund from that date. Therefore, if it appears on the winding up that the wife has no personal estate, the alimony will be really and truly an allowance for necessaries, chargeable to the husband under Section 212. But if the wife has any income—producing property, the alimony paid *pendente lite* will offset this income during the same period.[1]

Such is the general outline of measures taken during proceedings to carry out the reciprocal duty of support of Section 212. However, because of the exceptional situation resulting from the divorce or separation suit, the courts have found it necessary to complete them by other remedies to meet the emergencies. They were naturally brought to utilize here the right which they have recognized to the wife to charge her husband's credit, although, as has been noted, the married woman was legally incompetent until the law of February 19, 1938. Yet the more recent decisions indicate a tendency to reject the theory in this particular case.[2] Some courts even went further and appointed a sort of trustee to pay the alimony for the husband's account, or, more frequently, restored to the wife the right to administer her personal estate, *pendente lite*. The legislator himself assisted the courts in this direction. A law of July 13, 1907, reserves to married women the administration and disposal of the property derived from their personal professional activity, and gives them the right to attach their husband's salary, should he fail to provide for them. Nor is this the only procedure to enforce payment of the alimony granted by the court. Faced by the considerable number of cases in which the debtor did not satisfy his obligation, and owing to the practical inefficiency of the civil modes of enforcement, a law of April 7, 1924 (amended April 3, 1928) made a penal offence of the non-payment of alimony. The debtor may be sentenced from three to twelve months imprisonment and to a fine from 100 to 2000 francs. If the offence is renewed, other penalties may be incurred, such as destitution from paternal authority.

Because of its object and juridical basis, alimony *pendente lite* ceases to be due when divorce is pronounced. The judgment dissolves the marriage. With it disappears the reciprocal duty of support. Moreover, the matrimonial property is wound up, each spouse recovers full and free control of his or her estate and can then support himself or herself. There is only some hesitation as to whether the debt is extinct when the decision becomes final, no longer subject to appeal, or whether it

[1] Decision of the Paris Court of Appeal, May 25, 1917, SIREY, 1928, 2, 4.
[2] Decision of the Court of first instance of the Seine, October 15, 1930, SEMAINE JURIDIQUE, 1931, 17.

should be prolonged until the end of the liquidation of the matrimonial estate. Court decisions are rather in favour of this last solution.

Thus it would seem that divorce severs all personal and all patrimonial ties between the spouses, and puts an end to alimony. But the problem is more difficult to solve. Under Section 301 of the Civil Code, "unless the marriage settlement provided some advantage on dissolution of the marriage, or provided insufficient advantages for the spouse who obtained the divorce, the court may grant such spouse an alimony, guaranteed on the property of the guilty spouse, in an amount not to exceed a third of the latter's income. Such alimony will be revocable if it ceases to be necessary." Thus, alimony *pendente lite* is replaced by a *permanent* alimony, granted in the above conditions exclusively to the spouse who obtained the divorce. The juridical nature of this alimony differs to a large extent from that of alimony *pendente lite,* with resulting differences in practice which have recently been submitted to the courts, under pressure of present economic instability.

The permanent alimony granted after divorce is, in principle, in the nature of an indemnity compensating damages. Although designated by the same terminology—*pension alimentaire*—it is recognised that it cannot be governed by the general rules on other allowances for necessaries attached to certain family relations between debtor and creditor. This for the simple reason that there is no longer any family tie between divorced spouses. The difference of nature appears from the provisions of the law which, although it uses the expression *"pension alimentaire"* and subordinates its grant to the absence of stipulations in the marriage settlement advantageous to the creditor, nevertheless makes it the exclusive privilege of the innocent spouse and takes the paying capacity of the debtor into account only up to one third of his or her income. Because it can be granted *only* to the innocent spouse, permanent alimony becomes the penalty of a tort: the matrimonial offence which led to the divorce. Should both spouses be recognised guilty and divorce pronounced "against both," no alimony would be due, the reason being that the less serious of either offences was enough to justify dissolution of the marriage. The damage caused to the innocent spouse by the matrimonial offence is the loss of the benefit of Section 212 and the claim to support from the other spouse. This section is precisely (as we have seen already) the legal basis of alimony *pendente lite.* Thus has arisen a frequent confusion between them. But it must always be remembered that, whereas the former is a particular mode of performance of the duty of mutual support in exceptional circumstances, the latter is a compensation for its disappearance because of the divorce. The legal basis is the same, but the technique of either institution is quite different. There is no problem, concerning permanent alimony, as to the final charge of the debt. It cannot be deducted from any property alloted to the innocent spouse on liquidation of the marriage settlement and must be borne definitely by the guilty spouse. Also, the grant of such alimony is no obstacle to the grant of an indemnity for any damages, other than the loss of support, which the divorce may cause to the innocent spouse.

Moreover, because it is in the nature of damages rather than an allowance for necessaries, permanent alimony may be claimed in a separate suit, after the divorce, provided the damage on which the claim is founded be the direct result of the divorce. This precisely because it is founded on the damage caused by the dissolution of the marriage. If, on the contrary, it were in the nature of an allowance based on Section 212, the divorce, having destroyed the matrimonial tie, would be a bar to any future claim on this ground. But one must always remember that permanent alimony is the compensation of a particular damage: the loss by the innocent spouse of the claim to support from the other. It is directly connected with the existence in the past of the matrimonial tie and many characteristics of permanent alimony resemble those of other allowances for necessaries attached to family ties. Permanent alimony exists only because there has been a marriage, and although it has been dissolved by divorce this important factor in the past cannot be ignored altogether in the future. Even after its destruction it continues to influence the law of alimony and gives it its peculiar legal "climate." So strong is the tendency to permanence of the institution of marriage, even in liberal legislations admitting of divorce. The result is that permanent alimony stands half way between damages and allowances. This peculiar situation has been brought to the light more vividly in the recent evolution of case law on the matter.

The principal instance of the hybrid character of permanent alimony is given by its mode of valuation. If it were purely an indemnity, it would be estimated on the amount of the loss, irrespective of the debtor's means of payment. Now we have seen that the law itself limits alimony after divorce to one third of the debtor's income, somewhat as in the case of allowances estimated according to the means of both parties. Moreover, if it were purely in the nature of an indemnity, it would be estimated proportionately to the damage at the time when it was caused, *i.e.*, at the time of the divorce, and this estimation would be final. Future changes in the means of creditor and debtor would not have to be taken into account. Or, if they could be considered, it would be only insofar as the change in the means of either party was the direct result of the debtor's tort. The older decisions refused to increase the alimony when the needs of the creditor were increased because of new circumstances independent of divorce itself, such as the rise in the cost of living.[3] But the force of circumstances led the courts gradually to yield on their principles. The fact that, after all, alimony, although in the nature of damages, exists only because there has been a marriage between the parties influenced them irresistibly in favour of applying some rules proper to allowances for necessaries attached to family relations. The first step was to grant a revision when the necessity to increase resulted directly from the divorce.[4] Then, under pressure of economic conditions, the courts ceased to require this direct connection. In a decision of June 28, 1934, the Supreme Court[5] said that alimony "subject to all the rules governing allowances for necessaries could be reduced or even suppressed if the divorced spouse came to better fortune, just as it could be

[3] *Cassation*, Oct. 10, 1926, DALLOZ, 1927, 101, annotated by Prof. Rouast.
[4] *Cassation*, Jan. 17, 1934, SIREY, 1934, I, 377, annotated by Prof. Esmein.
[5] SIREY, 1934, I, 377.

revised by taking into account new circumstances of the debtor and fresh *needs of the creditor*." Permanent alimony may thus be revised after divorce, if the needs of the creditor have increased since then, whatever may be the cause of that increase. Nevertheless, the evolution from the characteristics of an indemnity toward those of an allowance is not yet quite completed. The courts are still opposed, as we have seen, to the *grant* of alimony after the divorce, unless the cause of the claim dates back to the divorce itself.[6]

This evolution has led some authors to consider that the duty of mutual support under Section 212 survives dissolution of the marriage by divorce.[7] In their opinion, the same social necessity which imposed the creation of that obligation imposes its maintenance. It is the necessity to find, whenever possible, a responsible person to support poor citizens, rather than let them become a burden on public relief organizations. During marriage, it is only natural that the spouses be responsible for one another's support. After marriage, it is equally natural that the burden of supporting the innocent spouse should rest on the guilty spouse, rather than lie on the community. The argument is that, granting an alimony to compensate the loss of the benefit of Section 212 amounts to the same thing as substituting to the normal mode of performance of the obligation to support (normally performed in kind by cohabitation) the payment of an allowance in money, sole possible means of performance between divorced spouses. The guilty spouse, it is true, is deprived of the corresponding benefit attached to the condition of ex-spouse. But this is the penalty for his tort. Moreover, the Criminal Section of the Supreme Court appears to favour this view. In its decision of August 5, 1927[8] it declared the law of February 7, 1924 applicable in case of non-payment of the alimony. This law, as we have seen, has made default a penal offence. It is known as a Law on Neglect of Family Obligations *(abandon de famille)*. Its application in the case of permanent alimony after divorce clearly shows that, in the eyes of the Criminal Section of the Supreme Court, there is a "family obligation" subsisting between divorced spouses.[9] Although this theory is still proposed with much prudence and raises many serious objections, yet it must be admitted that it gives a satisfactory theoretical account of many of the solutions adopted by case law and that it provides a convenient answer to the problem of the precise juridical nature of permanent alimony. It shows also at any rate how difficult it is, even for the Law, to ignore a state of fact established in the past under its auspices, and destroy all its consequences in the future. Here, for example, the parties were married once. They may become divorced. But they will always be "divorced spouses," *i.e.*, something different from total strangers.

[6] *Cassation*, Feb. 15, 1938, DALLOZ HEBDOMADAIRE, 1938, p. 210. The creditor must show that his condition "is the direct consequence of the divorce and does not result from later events."

[7] *Cassation*, Jan. 11, 1938, DALLOZ, 1938, I, 37, annotated by J. Vandamme.

[8] DALLOZ, 1928, I, 32, annotated by Prof. Nast.

[9] The Aix Court of Appeal, in its decision of March 19, 1915, and the Cour de Cassation, Civil Chamber, on April 21, 1921 (DALLOZ 1924, I, 91) held that remarriage of the beneficiary put an end to permanent alimony, thus apparently supporting the theory that it is based on an obligation to support which, in that case, passes to the second spouse. However, there are conflicting decisions, based on the theory that permanent alimony being an indemnity for damages should be maintained, as the second marriage has no effect on the first husband's tort.

THE GERMAN LAW OF ALIMONY BEFORE AND UNDER NATIONAL SOCIALISM

H. MANKIEWICZ*
Translated by L. L. Fuller†

The law of alimony tends to be shaped by the conception which the legislator or judge has of the nature of marriage itself. It is therefore not surprising that National Socialism, as a consequence of its new conception of marriage as a "service to the folk-community" (Lange), has arrived at a regulation of the claim to alimony differing from the previous "liberal" regulations on the subject. This new conception found its legislative expression in a law passed July 6, 1938, and becoming effective August 1, 1938, and which had for its general object the unification of the law of divorce and separation for the whole of Greater Germany, including Austria.[1]

It seems, however, inadvisable to pass at once to a consideration of this statute, which as yet has scarcely received judicial interpretation. The reforms which this statute introduces are to be understood only by placing them against the background of the previous law of the Civil Code, a body of law which has the advantage from our present standpoint of being more readily compared with other occidental systems.

What follows is divided into two main divisions, the first dealing with the law before the National Socialistic reforms, the second dealing with the present law. In both sections we shall consider first the relevant substantive provisions, and then the machinery of sanctions available for enforcing the claim to alimony.

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TRANSLATOR'S NOTE. Mr. Mankiewicz very generously expressed his willingness that the translator of his article should be unconstrained by compunctions of literalness, and also gave his consent to such excisions from the article as might be necessitated by considerations of space. I have made very free use of the first branch of this indulgence, and a somewhat more sparing use of the second. The distance separating us has made communication during the process of translation impossible, though because of the extensive prerogatives which I have exercised such communication would have been particularly desirable in this case. I am indebted to Mr. Joseph Laufer, student in the Duke University School of Law, and to Dr. Ernst Morwitz for assistance on certain points of German law and legal terminology, though unfortunately it has not been possible for either of these gentlemen to check the accuracy of the translation as a whole.

[1] REICHSGESETZBLATT, 1938, pt. I, p. 807.

I. THE CLAIM TO ALIMONY UNDER THE GERMAN CIVIL CODE

A. Fundamental Conceptions

The German Civil Code, the relevant sections of which remained in force until August 1, 1938, abstains from setting up a definite conception of marriage. This is understandable in view of the political composition of the Reichstag which enacted the code, the principles of the Catholic Center on this subject being scarcely reconcilable with those of the more "progressive" parties. The introductory paragraph concerning the "Effects of Marriage in General" (§1353) contains in its first section simply a rather colorless statement to the effect that "the spouses are mutually obligated to a conjugal life in common." According to the *Kommentar der Reichsgerichtsräte*[2] this obligation embraces "all the duties, including those not specially mentioned in the code, which in accordance with the ethical nature of marriage flow from the personal relations of the spouses." "All the duties which are in this manner determined become legal duties."[3]

It corresponds entirely to the fundamental point of view of political liberalism, that the legislator should consider the institution of marriage only under its juristic aspect, and should consider himself as justified in imposing a regulation of the duties which flow from this "conjugal life in common" only to the extent to which these duties have been or can conveniently be converted into legal duties. It is therefore in my opinion wholly out of place to conclude, with the National Socialist jurists, that the Civil Code placed marriage legally on the plane of a "bilateral contract for sexual performance." A thorough study of the German case law before National Socialism shows, on the contrary, that the courts (perhaps more than the legislator) were fully aware of the ethical and institutional character of marriage. It was precisely on the institutional character of marriage that they relied in converting "merely" moral duties into legal duties capable of enforcement in order in this manner to hold the parties to an ethical conception of the marital bond. This attitude is especially clear in the treatment of divorce and in the attitude taken with regard to contracts for support made before divorce, which have for their purpose the "purchase" of the consent of one party to a dissolution of the marital bond, and which were therefore declared immoral and void by the courts. It would go beyond the purposes of this article to attempt to follow this body of case law in detail. Suffice it to say that the German courts of the pre-National Socialist era also viewed the "rights" asserted by the spouses in the light of the ethical nature of marriage, and gave them sanction only in so far as they were compatible with this nature.

Nevertheless the effects of marriage, derived from its institutional nature, were limited to the existing marriage. Direct effects projected into the future after the dissolution of the marriage were not considered to result from its institutional and ethical character. This was not altered by Article 119 of the Constitution of the German Republic of 1919 which declares, "Marriage, as the foundation of family life

[2] Note 2 to §1353.

[3] Reichsgericht in DAS RECHT, 1908, No. 3439; LEIPZIGER ZEITSCHRIFT, 1923, p. 451.

and the preservation and increase of the nation, stands under the special protection of the Constitution." In his work on legal philosophy Radbruch shows how far this conception of marriage differs from a purely ethical view of the marital bond, such as is found in the canonical law, and departs from that view precisely in that it presents marriage under a "secular and political point of view." From a "secular and political point of view" it is only the actually existing marriage, or the marriage which is to be kept alive, which can claim the protection of the legal order. The dissolved marriage is without pressing legislative importance.

From these considerations flows the attitude of the legislation of political liberalism toward the regulation of alimony after divorce has been granted. This regulation finds its foundation not in the nature of marriage, but in the grounds for its dissolution. The dissolved marriage necessarily loses its ethical and institutional character. The problem becomes merely a matter of the financial liquidation of a previously existing legal relation. The peculiar nature of this legal relation finds only a continued feeble expression in the special character of the sanctions given the claims arising out of this liquidation, and the special nature of these sanctions is attributable not so much to their origin as to their peculiar object, which is the providing of support for the claimant. It is not surprising that the contractual nature of marriage should overshadow its ethical and institutional character precisely at the time of divorce, when the parties to the marriage wish to free themselves from the chains of this "conjugal life in common." It is naturally the contractual nature of marriage, so prominently to the fore at the time of its "liquidation," which sets the tone for the regulation of such matters as alimony. It would, however, be a mistake to conclude from this that the "liberal citizen" views marriage purely as a bilateral contract. Those marriages which become merely burdensome contracts present a minority, even though in recent years they have become a considerable proportion of the existing marriages in Germany, and surprisingly have increased appreciably during the first years of the National Socialist régime, which wishes to restore to marriage its institutional character as modified by the National Socialist conception of the "Volk."[4] On the other hand, it certainly cannot be denied that the fact that marriage could be dissolved almost as if it were an ordinary private contract influenced many to enter that relation who would not have assumed the marital bond had it been conceived as founding a broader obligation. As a result, many marriages were

[4] The following figures indicate the number of divorces per 10,000 marriages granted in Germany for the period 1929-1937:

Year	*Number of divorces per 10,000 marriages*
1929	29.0
1930	29.5
1931	28.5
1932	29.7
1933	29.7
1934	37.0
1935	33.0
1936	32.6
1937	29.8

entered under the aegis of contract, instead of under that of a moral community of life-interests.

B. Basis and Scope of the Claim to Alimony

When marriage is viewed from a secular and political point of view it necessarily loses every institutional and ethical quality on dissolution, and can have meaning only as a previously existing legal relation. From such a conception it follows that the reciprocal claims of the spouses on dissolution of the marriage can properly be determined only by principles of contract law. The notion of contract violation is therefore determinative not only for the establishment of these claims but also for their scope.

The acceptance of culpable contract breach as the basic theory of liability leads logically to the following principles concerning alimony, which are in fact declared in the sections of the Civil Code indicated in parentheses:

(1) A claim to alimony exists only against a party to blame for the divorce and in favor of an innocent party. If both spouses are at fault, neither can claim alimony. (§1578)

(2) If the alimony claimant is the wife, it is presumed that she exercises no gainful occupation, and her right, in accordance with general principles of contract law, is to secure "what she would have had, had the damaging event not occurred" (§249), which as applied to this case means that she is entitled to receive the maintenance befitting her station. (§1578) "Maintenance befitting her station" is construed to refer to the status of the husband at the time of divorce, and not to the status which he may later occupy.[5] An increased need, for example, as the result of illness, gives no right to an increase in alimony payments.[6]

(3) The "damage" which the wife suffers is, however, reduced if "according to the circumstances in which the spouses lived, earning by the wife's labor is customary." In this case the husband declared to be at fault in the divorce proceeding is bound to supply a maintenance befitting the wife's station only in so far as her own earnings are insufficient for that purpose.[7]

(4) Similarly, if the wife enjoys an income on property of her own, the husband is bound to provide maintenance only in so far as the wife's income is insufficient for that purpose. (§1578) Again, this result is not inconsistent with general principles of contract law, but represents, on the contrary, an application of them. Under the German law of marital property rights the husband has the management and use of the wife's property during the marriage, except under the régime of separate property. Even under that régime the wife is bound to contribute to the matrimonial expenses from her separate income. (§1427) Accordingly, the reduction of her claim to alimony by the amount of her separate income is simply an application of the general theory that she should be placed in the position she would have occupied had her

[5] REICHSGERICHT, Oct. 26, 1936, IV, 169/36; JURISTISCHE WOCHENSCHRIFT, 1937, p. 465.
[6] LANDGERICHT BERLIN, Nov. 3, 1934; JURISTISCHE WOCHENSCHRIFT, 1935, p. 70.
[7] Concerning the concept of "customary," see REICHSGERICHT, Oct. 26, 1936, IV, 169/36.

husband not wrongfully caused a termination of the marital relation. It is on the same theory that the divorced wife is not bound to touch the principal of her capital, even though she may be quite rich and her husband dependent on his earnings. During the marriage she was not bound to expend her principal, and to compel her to do so now would represent a "damage" to her.

(5) During marriage the wife is bound to provide for the maintenance of the family in so far as the husband is unable to do so. Accordingly, as a logical consequence of the principles already mentioned, in case of divorce the wife adjudged exclusively guilty is bound to provide her husband with a maintenance befitting his station in so far as he is unable to support himself. (§1578)

The claim to alimony arises when the divorce decree goes into effect. Pending the litigation the court having jurisdiction over the divorce proceeding can make a provisional disposition of the problem of maintenance to last until the divorce decree becomes effective. (Code of Civil Procedure, §627) The court, which in this matter is granted a wide discretion, is expected to follow the general principles laid down in §1361 of the Civil Code. The court must, accordingly, deny or restrict the husband's obligation of maintenance where to do so "would be equitable in view of the needs as well as the means and earning capacities of the spouses." The court has the power furthermore to reduce the wife's claim to the barest necessities where it is convinced that she has been guilty of a moral offense.[8]

It is only a necessary consequence of the conception underlying the regulation of the claim to alimony that the claim ceases with the death or remarriage of the claimant. (§§1581, 1582) (The heirs of the claimant can recover only sums due and unpaid at the time of the claimant's death. (§1580, par. 3, in combination with §1615)) The death of the obligor, on the other hand, does not destroy the claim, although in that case, according to Section 1582, par. 2, the claimant must consent to a reduction of the alimony payments to one-half of the income which the obligor derived from his property at the time of his death.

I am fully aware that the conception of alimony as a kind of transfigured claim to damages stands in a certain contradiction with the conception which prevailed in Germany even before National Socialism. The *Kommentar der Reichsgerichtsräte* declares, for example,[9] "Guided by the conception that to treat marriage as a source of financial advantages would be to contradict the nature of that institution, the Civil Code has joined to divorce a claim to maintenance limited to necessities. In the definition of this claim the prevailing notion has been that of an equitable after-effect of the marriage." This conception seems out of place, on the one hand, because it is precisely not a matter of a "claim to maintenance limited to necessities," but of a claim to support befitting the claimant's station in life, and, in the second place, because it is difficult to see why, from this point of view, the claimant should be limited to a right to continue the standard of life enjoyed during marriage, and

[8] See STEIN & JONAS, DIE ZIVILPROZESSORDNUNG FUER DAS DEUTSCHE REICH (1929) III, 2, on §627 of the Code of Civil Procedure.

[9] Note 1 to §1578.

should be excluded from participating in a subsequent improvement in the status of the obligor. Furthermore, the extinction of the claim on remarriage is justified, as we shall show later, on quite other grounds than "an equitable after-effect of the marriage." The conception of alimony as basically similar to a claim to damages is further indicated by the fact that the provisions of Section 1611 are not made applicable to alimony so as to reduce or destroy the claim in case the obligee is guilty of some fault toward the obligor after divorce.[10]

It is of course perfectly true that the conception of marriage as a mere contract and the construction of alimony as a claim to damages are not notions which are overtly declared. Their open avowal would of course be shocking to a community of right-thinking citizens. Nevertheless the solemn declarations of the Supreme Court cannot, in my opinion, change the fact that, under the system of the Civil Code, marriage is, after its dissolution, viewed in retrospect as a mere contract, or that the claim to alimony granted by the Code is in effect construed as a claim to damages. To be sure, it is a claim to damages of a special character inasmuch as it is directed toward obtaining maintenance. Accordingly, it is subjected not to the statutory provisions governing money claims generally but to those specially established for claims to support.

This is the reason for the relativity of the scope of the claim, the satisfaction of which, in contrast to ordinary claims to damages, will not be allowed to lead to the economic ruin of the obligor. Section 1579 lays down accordingly a special rule for the case where the obligor "in view of his other obligations is unable to provide maintenance for the obligee without imperilling his own maintenance according to his station." In this case the obligor is permitted to retain for his own maintenance two-thirds of the income available for his maintenance, and if this is not sufficient, then to retain so much as may be required therefor. If he has to support an unmarried minor or a second wife, his obligation is restricted to "that which with regard to the needs as well as the means and earnings of the parties, corresponds to equity." Furthermore, in this case, and only in this case, is the husband freed from the obligation to support his former wife, if the wife can provide for her own maintenance out of the principal of her property. (§1579, par. 2) Finally, the claim is limited by the provision of Section 1611 (in combination with Section 1582, par. 2) that "one who comes in want through his own moral delinquency can demand only the barest necessities for his maintenance," though, as has already been pointed out, a moral offense toward the obligor which does not affect the obligee's ability to support himself is without effect on the claim to alimony.

The scope of the claim is, therefore, not set once and for all. It varies with the advance or decline of the obligor's economic situation. Machinery for effectuating this variation is provided by Section 323 of the Code of Civil Procedure, which reads, "In case there occurs an important change in the circumstances which were determinative in entering a decree for performance or in setting the time for performance,

[10] REICHSGERICHT, Oct. 29, 1934, IV, 139/34; JURISTISCHE WOCHENSCHRIFT, 1934, p. 3271.

either party is empowered to bring an action for the purpose of securing an appropriate alteration in the decree." The same principles are applied by the court where the amount of alimony is set by contract, indeed, even where the contract contains an express waiver of the right to apply for modifications.[11] This is on the basis of a tacitly assumed *clausula rebus sic stantibus*. It should, however, be observed that the court imposes extraordinarily strict requirements before it will modify a contract for alimony. There must exist such a disparity between the former and the present situation of the party, or parties, as to destroy the underlying basis for the contract.[12]

Concerning contracts settling the question of maintenance and entered into by the parties before the decree of divorce, it may be said generally that the court has always viewed such contracts with great distrust. Proceeding from the considération that the legislator intended to preserve existing marriages as long as possible, the court declared to be incompatible with the nature of marriage, and therefore immoral, all contracts which were intended to make possible or facilitate a divorce. Plainly objectionable, from this standpoint, were contracts where a promise of support, or a waiver of the claim to support, was made for the purpose of inducing the other party's consent to a divorce. Contracts for support were only valid where the party entitled to divorce was already determined to bring a suit for divorce in any event. The borderline between the permissible and unpermissible in this field was unusually vague. We shall forego a detailed discussion of the cases, however, since the question is now expressly governed by statute, and a source of constant uncertainty has, at least in appearance, been removed.

C. Enforcement of the Claim to Alimony

The claim to alimony is basically a claim to periodic payments. (§1580, par. 1) An income can, however, of course, be secured through the payment of a lump sum, and Section 1580, par. 2, provides that where an important reason exists, the party entitled to alimony may demand an adjustment by a capital sum.

Provision is furthermore made for rendering secure the obligation to make future periodic payments. The procedure for obtaining security for future performances generally by a sequestration of the debtor's property is made subject by the Code of Civil Procedure to certain conditions which are not always easily established. On the other hand, a decree *in personam* directing the obligor to render security for the performance of obligations as yet unaccrued is an unusual procedure. Because of the peculiar character of the claim to support, Section 324 of the Code of Civil Procedure creates a special claim to security for future performance in this case. According to this section the obligee can demand security, though none was provided in the original decree, or can demand an increase in the security originally provided, "where the economic condition of the obligor has become worse to a significant degree." In

[11] REICHSGERICHT, May 27, 1935, IV, 19/35; JURISTISCHE WOCHENSCHRIFT, 1935, p. 2619.

[12] REICHSGERICHT, July 5, 1934, IV, 25/34; JURISTISCHE WOCHENSCHRIFT, 1934, p. 2609; REICHSGERICHT, Nov. 26, 1935, VII, 134/35; JURISTISCHE WOCHENSCHRIFT, 1936, p. 927.

this case it is accordingly not necessary to prove that the performance of future obligations has actually been endangered.

The special nature of the claim to alimony finds expression also in the preferred position enjoyed by the creditor in the matter of enforcing the claim through garnishment, an advantage which this claim shares with all other claims to maintenance. Section 850(4) of the Code of Civil Procedure (concerning the amendment to which by the Law of October 24, 1934, we shall have occasion to speak later) provides that the limitations on the right to garnishee debts due the defendant, in the form of exemptions favoring the salaries and pensions of certain classes of persons, have no application where the garnishment is demanded to enforce the payment of a statutory obligation to provide support arising since the action to secure support was commenced or during the three months preceding the bringing of the action.[13] This special right to reach by garnishment debts otherwise immune from the claims of creditors is granted only because the claim enforced is one for the living expenses of the plaintiff. The preferred status of the claim is, therefore, destroyed by its assignment to a third person.[14]

A word may be added concerning the attitude of the courts toward debtors who have attempted to make themselves execution-proof by fraudulent transactions. Such a case is presented, for example, where the husband adjudged at fault in the divorce proceedings conveys his business to a second wife and works for her "gratuitously" or where he assigns to her his future earnings. The courts have always proceeded very severely against such debtors. They have, furthermore, through an application of Section 826 of the Civil Code, declared the favored third person liable for damages where he knew that the purpose of the transaction was to remove the property or earnings of the debtor from the reach of his creditor.

The claim to support is given a criminal law sanction by Section 361(10). The punishment here provided (imprisonment or a maximum fine of 150 marks) is incurred by one who "although he is able to provide support for the person toward whom he is obligated, evades his obligations, in spite of the demand of competent authorities, in such a manner as to make it necessary for the authorities to secure help from another source," as, for example, when the obligee becomes a charge on public charity. Obviously there are practical difficulties in the application of this provision to debtors in modest circumstances who are dependent on their own earnings. A sentence of imprisonment runs the risk of depriving such a person of his job, while, on the other hand, the collection of a fine, along with court costs, can easily deprive him of the only resource out of which he could have met the claim.

[13] It should furthermore be remarked that claims held by the obligor which according to the Insurance Code would not ordinarily be garnishable are by §819 of that statute made subject to garnishment in favor of an alimony claimant. KAMMERGERICHT, May 27, 1930, 8 W 3754/30; JURISTISCHE WOCHENSCHRIFT, 1932, p. 1403.

The claim to support is also given a preferred status inasmuch as it may be enforced through a garnishment of wages to an extent not otherwise permitted by the statutory provisions relating to that subject. The present law on this subject, established by the Law of October 24, 1934, is discussed later.

[14] See STEIN & JONAS, *op. cit. supra* note 8, note IV, 2-a, to §850 of the Code of Civil Procedure.

The practice is therefore to suspend the sentence if the debtor promises to provide the support promptly. If he defaults on an instalment, the criminal proceeding will be reopened. This expedient suffices in the majority of cases to induce payment. Though one may entertain legitimate doubts as to the legal propriety of such a manipulation of the criminal proceeding, there is no doubt that from a practical standpoint it is the only effective procedure.

II. THE CLAIM TO ALIMONY UNDER THE NATIONAL SOCIALIST LAW OF JULY 6, 1938

A. Fundamental Conceptions

In the system of National Socialism marriage is deemed to have an essentially different meaning and function than under a "liberal" régime. This new conception of marriage is, of course, not without influence on the claim to alimony.

In the world-view of National Socialism, which rests on the racial principle, and which has as its highest aim the development of a racially pure community, marriage demands and secures the protection of the state because, and in so far as, it is the wellspring of new racial life. Only those marriages are basically deserving of protection in which racially worthy spouses have united for the purpose of bringing into existence the largest possible number of biologically desirable children. According to the "official explanation"[15] of the Law of July 6, 1938, the National Socialist conception of marriage differs from that of Liberalism in that it does not, like the latter, "see in marriage a contract-like union entered for the purpose of realizing individual interests. . . . On the other hand, National Socialism does not, like the confessional viewpoint, consider the sanctity of the institution of marriage to lie in other-worldly conceptions or religious associations, but in the meaning of marriage for the maintenance and health of the German Folk." For "marriage serves primarily the preservation and increase of the Folk."

Accordingly the state which bases itself on the National Socialistic world-view, and which seeks the realization of this world-view in all fields of life, will not concern itself with those marriages which are "worthless" for the community because racially desirable children cannot result from them. In this respect, a marriage which was worthless from the standpoint of the community would be basically indifferent to the National Socialist state. If the state cannot, however, wholly ignore such marriages, this arises from the fact that any marriage presents a kind of molecule of order inside the larger order of the Folk, and a shattered marriage would disturb the order of the community if it were not liquidated in an orderly manner. Liquidation in this sense includes a proper regulation of the question of support, which, on the one hand, facilitates the dissolution of a marriage become burdensome, and, on

[15] TRANSLATOR'S NOTE. The expression "official explanation" is intended as a translation of the word "*Begründung.*" The German statutory *Begründung* is an institution for which there exists no exact counterpart in our legislative practice. It is, as a matter of fact, usually more than an explanation of the statute; it normally describes in some detail the need which gave rise to the statute, often reviews briefly the previous state of the law, and generally explains and justifies the action of the legislature. It is less formal and more detailed than the statutory preamble which occasionally performs a somewhat similar function with us. Its closest analogue in this country would be the notes and commentaries which sometimes accompany the recommendations of law revision commissions.

the other, by creating a kind of order between the divorced spouses consistent with the general order avoids disturbing the latter. An additional consideration is that "particularly in the National Socialist state care must be taken that the smallest possible number of members of the Folk shall be dependent for support on public charity."[16]

The National Socialist regulation of alimony is, accordingly, primarily concerned with questions of expediency. It is therefore characteristic that the official explanation of the Law of July 6, 1938, in spite of its considerable length, refrains from any detailed discussion of the moral and legal reasons for the right of alimony granted by the statute, and confines itself to a reference to the "new conceptions."

If one proceeds from the conception of marriage as an institution ("order" in the National Socialist sense) creating its own law, then the regulation of claims to alimony results from the nature of marriage itself, and the question of fault can have only a subsidiary and modifying effect on the granting of alimony. Entrance into the marital status involves an engagement binding the spouse for life. This engagement continues even when the marriage, for whatever reason, is dissolved. The question who was to blame for the dissolution can affect this engagement only in so far as the existence and scope of a moral engagement is always influenced by the conduct of the person toward whom the engagement is contracted, and in so far as a moral fault can be unequivocally attributed to one party. And when, in an inner relationship like marriage, is this really possible?

The duty to pay alimony appears properly therefore not so much as an after-effect of the marriage as of the undertaking involved in the act which creates the marriage. This engagement, once undertaken, embraces the whole life of the party for his whole life, and cannot be affected by the dissolution of the marriage. It follows from this ethical and institutional view that basically each spouse is bound to support the other whenever the need for support arises. It follows further that the extent of the obligation is independent of the "station" of the spouses during marriage, and must be determined by the actual relevant circumstances of the parties at the time the support is supplied.

It is not our intention to provide a supporting argument for the National Socialist reforms of the law of alimony, an argument which could not, in any event, claim to be authoritative. Nevertheless is it undeniable that these reforms, in spite of the racial conception of marriage which underlies them, approach closely the rules which result from the conception of marriage as an institution founded on a purely moral basis.

B. Basis and Scope of the Claim to Alimony

Since National Socialism views marriage primarily as a purposive institution, it permits divorce even where no fault is present whenever a marriage cannot in fact

[16] Moessmer, *Neugestaltung des Deutschen Ehescheidungsrechts, vorgelegt von dem Vorsitzenden des Familienrechtsausschusses der Akademie für Deutsches Recht*, SCHRIFTEN DER AKADEMIE FUER DEUTSCHES RECHT, BERLIN.

fulfill its purpose and, *a fortiori,* where it creates a discordant element in the general order of the community.[17] It should be remarked that National Socialism has here, though with a different asserted justification, fulfilled a demand which had been made and actively campaigned for in socialist circles under the Weimar Republic.

As a result of this recognition of divorce for "objective" reasons, not dependent upon a showing of fault, the new law, in contrast to the Civil Code, distinguishes fundamentally between two different cases of alimony: (1) where divorce results from the fault of one of the spouses, and (2) where the divorce does not rest on fault. The circumstance that these two cases are given separate treatment, and that furthermore the "divorce for fault" is regarded as the principal or ordinary case, shows that the new regulation is not derived from the institutional character of marriage, and that, in spite of all assurances to the contrary, it bears a rather close relation to the system of the Civil Code.

In case one spouse is exclusively at fault in the divorce, the rules of the Civil Code remain basically unaltered. (§66) New, however, is a provision that a claim to alimony arises in the case of a divorce where both spouses are at fault, provided the predominant fault is declared to rest with one party. The party predominantly at fault is placed on the same footing as the party exclusively to blame for the divorce. (§66) According to the official explanation of the statute, this reform rests on the following considerations, the justice of which will be testified to by anyone who has been occupied with divorce litigation, either as judge or attorney. "The decision of the spouses to take the decisive step and ask for a divorce will often depend upon the anticipated disposition of the question of alimony. The rules concerning alimony have an even greater influence on the question in what manner and with what means

[17] The relevant sections of the new law are as follows: "II. Divorce for other Reasons [than fault]. §50. *Conduct resulting from mental derangement.* When, as the result of conduct by one spouse, which cannot be regarded as culpable because it results from mental derangement, the marriage is so fundamentally disturbed that a restoration of a common life corresponding to the nature of marriage cannot be expected, the other spouse may demand a divorce. §51. *Insanity.* A spouse may demand a divorce where the other is insane, if the insanity has reached such a degree that intellectual and spiritual communion between the spouses has been destroyed and if a restoration of such communion cannot be expected. §52. *Contagious or loathsome disease.* A spouse may demand a divorce where the other suffers from a serious and contagious or loathsome disease, and the cure of the disease or the removal of the danger of contagion cannot be expected within a foreseeable period of time. §53. *Sterility.* (1) A spouse may demand a divorce where the other has become prematurely sterile since the marriage. (2) Divorce is excluded if the spouses have in common legitimate and biologically sound issue, or if they have a biologically sound child which they have adopted in common. (3) One who is himself sterile, has no right to a divorce. The same applies to a spouse who would not be permitted to enter a new marriage for reasons of health, or whom the Department of Health would have to advise not to remarry. §54. *Avoidance of hardship.* In the cases provided for in §§50-53 divorce may not be granted where the demand for it is not ethically justified. This is assumed to be the case in general where the dissolution of the marriage would visit an unusual hardship on the other spouse. Whether this is the case depends upon the circumstances, particularly on the duration of the marriage, the age of the spouses, and the cause of the insanity, disease, or sterility. §55. *Dissolution of common domestic life.* (1) Either spouse may demand a divorce if cohabitation has not existed for three years, and if, as the result of a profound and incurable disturbance of the marital relation, restoration of a life in common corresponding to the nature of marriage cannot be expected. (2) If the spouse who demands the divorce was wholly or predominantly to blame for the disturbance of the marriage, the divorce may be opposed by the other. This opposition is not to be heeded where the preservation of the marriage is not ethically justified in the light of a proper estimation of the nature of marriage and of the whole conduct of the two parties."

the litigational battle of the divorce suit will be carried on. The often deplored bitterness which characterizes so many divorce suits arises not so much from a sense of injury for wrongs suffered during marriage as from a concern by the one party lest the claim to alimony be lost, or by the other party to avoid the imposition of a burdensome liability." The hope of the legislator was to avoid this disagreeable aggravation of the unpleasantness more or less inevitable in a divorce proceeding by making predominant fault the equivalent of exclusive fault.

A further innovation consists in the fact that the maintenance provided is no longer defined as that "befitting the station" of the obligee but as that "appropriate to the circumstances of the spouses." (§66) Decisive are the circumstances in which the parties find themselves when the support is furnished, not those which existed during the marriage. It results that the party entitled to support participates as a matter of course in the subsequent economic fate, good or bad, of the obligor. The consequence of this innovation is that the claim to alimony loses its character of a claim to damages and reveals itself as a true after-effect of the broad engagement underlying marriage itself. This basic reform in theory is accomplished even though the official explanation of the statute contents itself with a reference to "present conceptions," and a commentator justifies the innovation by saying that "there is no room in the new law for the obsolete conception of a support 'befitting the station in life' of the party laid down in §1578 of the Civil Code."[18]

The distinction between the treatment of the claim to alimony by the innocent wife against the guilty husband, on the one hand, and that of the innocent husband against the guilty wife, on the other, is retained, since the husband is still only granted a claim to alimony where he is unable to support himself.

On the other hand, the wife's claim to alimony is altered somewhat by the fact that her own earning capacity is taken into account not simply where "according to the circumstances in which the spouses lived, earning by the wife's own labor is *customary*" (Civil Code, §1578), but instead whenever "according to the circumstances it can be expected that the wife should carry on a gainful occupation." (§66) Accordingly, the decisive point is not what was usual according to the position of the spouses during marriage, but what can reasonably be expected in the light of the circumstances existing at the time the support is provided. This disposition of the matter would seem also properly to flow from the fundamental engagement underlying the marriage. It is, however, justified by the official explanation of the statute in the following language: "In view of the position in economic life, as well as generally in the social structure of the Folk, which is today accorded the gainfully occupied woman, and in view of the modern conception of the worth of labor as a duty toward the folk-community, the answer to the question whether the divorced wife's claim to alimony can be eliminated or reduced by her own earning capacity can no longer be made to depend upon what . . . was usual under the circumstances in which the

[18] AUERT, DAS NEUE GROSSDEUTSCHE EHERECHT (1938) note 2 to §66.

parties lived during marriage but upon what . . . can reasonably be expected in the light of all the circumstances."

We have previously outlined the somewhat elaborate dispositions of the Civil Code for the case where the obligor, because of his circumstances or other obligations, is unable to pay the alimony to which the obligee would normally be entitled. Section 67 of the new law provides that in this case the obligor "need only provide so much as corresponds to equity in view of the needs of the spouses and their property and earning capacities. Where the obligor has to support unmarried minor children or, as the result of remarriage, a new spouse, the needs and economic conditions of these persons are to be taken into account." There is revealed in this provision the general effort of National Socialist legislation to preserve elasticity in statutory law in order to give to the judge in generous measure the opportunity to find the decision which seems just in view of all of the circumstances of the particular case.

The same considerations of equity find expression also in the most fundamental reform of the law of alimony contained in the Law of July 6, 1938. Section 68 provides that even where divorce is granted on the basis of mutual and equal fault, the spouse who lacks means of support may demand from the other spouse a "contribution to his or her support . . . when and in so far as this corresponds to equity in view of the needs, property, and earning capacity of the other spouse and of the relatives of the necessitous spouse who, according to §71, are obligated to support him or her."

This obligation to assist the spouse who comes in need, which is independent of the question of fault, can in fact only be understood as an after-effect of the moral obligation assumed in entering matrimony. For that reason it is all the more striking that the official explanation of the statute contains no real statement of the bases for this important and, in my opinion, most desirable reform. The explanation merely states that in changing the previous rigid system it was not thought wise to follow the advice of those who have urged "that even the exclusively guilty spouse should under certain circumstances be given, temporarily at least, a claim to support against the innocent spouse. Such a step could scarcely be reconciled with the natural sentiment of the people or with their conception of the meaning of the rights and duties involved in marriage, and would produce the danger of a relaxing of marital morality generally. The conditions for the granting of alimony shall for the future therefore only be lightened to the extent" already mentioned. In this connection one recalls also the claim asserted by the commission of the Academy for German Law on the basis purely of considerations of expediency that "particularly in the National Socialist state care must be taken that the smallest possible number of members of the Folk shall be dependent for support on public charity."

A peculiarity of this exceptional right granted by Section 68 to the spouse who shared in the fault for the divorce lies in the fact that it is a subsidiary claim. Although, as in the previous law, the obligation of the spouse to provide support generally precedes the similar obligation of the relatives of the spouse entitled to alimony, the "extraordinary" claim granted the necessitous spouse by Section 68 arises only

when and in so far as its allowance appears to be just in view of the property and earning capacity of the relatives of the spouse in need. (A further peculiarity of this claim, concerning the effect of the death of the obligor, will be mentioned in a moment.)

Under the new law a divorce may be granted, as we have previously mentioned, for "objective" reasons even though no fault of either spouse is established. If a divorce is granted solely on the basis of such "objective" grounds, Section 69 imposes on the party who asked for the divorce a duty to support the other. This duty is described in much the same terms as those used in Section 68 in imposing a duty of support in the situation of equal fault, except that it is not expressly provided that the spouse claiming assistance be without other means of support.

The provisions relating to the extinction of claims to alimony have also been altered, partly in order to give effect to the conception of equity and judicial discretion which pervades the whole statute, and partly in order to adjust the previous law on this subject to the new substantive provisions concerning alimony.

The statute preserves, in Section 73(1), the previous rule according to which "an alimony claimant who comes in need through his own moral delinquency can demand only bare necessities for his support." The new statute further specifically provides that "an increased need which has resulted from the gross fault of the obligee provides no basis for a claim to increased support."[19]

A new provision concerning the forfeiture of the claim to alimony has been added to fill a gap in the law of the Civil Code discussed previously. According to Section 74 the claim to alimony is forfeited if after the divorce "the obligee is guilty of a serious fault toward the obligor or against the will of the latter leads a dishonorable and immoral life."

The provisions concerning the effect of the remarriage or death of the obligor are in general retained. It is provided, however, in Section 78(3) that the extraordinary claim to assistance granted by Section 68 to the necessitous spouse in cases of equal fault is completely extinguished by the death of the obligor. This result is consistent with the conception underlying this claim, which departs so completely from the notion of indemnity for damage suffered. Section 78(2) also brings about a certain change in the effect of the death of the obligor on claims to alimony generally. In place of the purely mechanical restrictions on the obligation of the heirs contained in Section 1582 of the Civil Code, the new law provides that the obligor "must consent to a reduction of the payments in an amount which corresponds to equity in view of the condition of the heirs and the productiveness of the estate."

Because of its basic attitude toward marriage and its effort to regulate the problem of alimony not so much according to juristic conceptions as according to considerations of equity, National Socialism was in a position to accord a different treatment to the contract for alimony entered into before divorce than that which it had been given by the courts. Section 80 accordingly provides: "The spouses may enter

[19] Concerning the previous law on this point, see JURISTISCHE WOCHENSCHRIFT, 1935, p. 70.

agreements affecting the duty of support after divorce. In case such an agreement is entered into before the divorce decree goes into effect, it is not void simply because it facilitated or made possible the divorce. [The case law on this point had been to the contrary, as we have previously mentioned.] Such an agreement is, however, void when the parties in connection with the agreement have set up an inexistent or no longer existing ground for divorce, or whenever it otherwise appears from the contents of the agreement or from other circumstances of the case that the agreement is contrary to good morals." Just how far this formulation of the rule has brought about greater legal certainty appears at least to be doubtful. One can hardly avoid applying here the expression that the devil has been driven out by Beelzebub.

By way of summary it may be said that the new law, in so far as it departs from the dispositions of the Civil Code, is distinguished from the code principally by an extensive introduction of considerations of equity. It enables the judge to take generous account of the special circumstances of the individual case, and in this manner permits a disposition of the problem of alimony satisfying to the sense of right and morality. One can say of the new law of alimony what has been said of the even more elastic new divorce provisions, "everything depends on the judge."[20] This remark is all the more appropriate in view of the fact that the new law, as so frequently the case with National Socialist statutes, is ambiguous as to its fundamental justification and may, therefore, be interpreted from different points of view even where no discretion is expressly conferred on the judge.

Not unjustified seems also the hope of the legislator that this new law, which gives the judge at once a great responsibility and a great freedom, will permit divorce and alimony litigation to be conducted with less bitterness than heretofore. The individual is no longer called on to "prove his rights," but rather to cooperate to bring about an equitable disposition of the case. The elastic formulation of the rules concerning alimony make it furthermore evident to the parties that even after divorce they are not strangers to one another, but that each participates in the subsequent life and fate of the other.

C. Enforcement of the Claim to Alimony

The possibility of disposing of the claim to alimony through the payment of a capital sum is preserved in the new law. A claim to this capital adjustment exists however, not, as in the previous law, simply where an "important reason exists" but only where such a reason exists *and* the capital adjustment will "not inequitably burden the obligor." (§70(2))

Where alimony is paid in periodic instalments, Section 70(1) of the statute provides, "The obligor must furnish security when the danger exists that he is seeking to evade his obligation. The form of the security is to be determined according to the circumstances." Section 324 of the Code of Civil Procedure, discussed earlier in this paper, remains in effect.

[20] SCHWARZES KORPS, July 28, 1938.

As has already been mentioned, the statutory provisions relating to the advantages enjoyed by the claim to alimony in the matter of enforcement through garnishment have also been altered by the Law of October 24, 1934, amending Section 850 of the Code of Civil Procedure. The new Section 850-a, like the old, provides that the "salaries of officers of the government and ministers, as well as of physicians and teachers in public institutions, and the pensions of these persons during permanent or temporary retirement" shall be exempt from execution to the amount of 150 marks a month. In case the sum received exceeds 150 marks a month, two-thirds of the excess shall also be exempt from execution. Subsection 3 provides, again following the previous law, that statutory claims to support may be enforced without reference to the limitations just stated. It is, however, provided that in this case so much shall be left to the debtor as is required for his own necessary support or for fulfilling his current statutory obligations to claimants to support having priority over the plaintiff. The amount thus left to the debtor shall not exceed, however, the total amount made normally exempt from execution by general creditors.[21]

A laudable change in previous law is effected by the last sentence of Subsection 3 which states that in those cases where the claim to support accrued more than one year before garnishment was asked the claim shall be granted a preferred status only in so far as there is reason to believe that the debtor has purposely evaded his duty toward the claimant. Whether this situation exists is determined not by a formal trial, but through an informal procedure on the motion for garnishment.

We have already spoken briefly of the German case law concerning fraudulent conveyances. The Law of October 24, 1936, contains two provisions materially facilitating the procedure against the defrauding debtor and his accomplice. These provisions apply in favor of any creditor, no matter what the origin of his claim may be, but it is not inappropriate to mention them here, since they offer important advantages to the alimony claimant.

The first of these provisions (the new Section 850-c of the Code of Civil Procedure) concerns the case where the debtor arranges with his employer that his salary shall be paid to a third person, for example, to a second wife. In this case it is simply provided that the creditor of the employee shall have the same rights of garnishment as if the salary were paid directly to the employee.

The second provision concerns the case where the debtor, in order to deprive himself of leviable income, works for another gratuitously, for example, for a second wife to whom he has conveyed his business. For this case Section 850-d provides, "In case a debtor standing in a continuing relation to a third person shall render services to that person which are customarily remunerated according to their kind and extent, an appropriate remuneration shall, as between the creditor and the recipient of such

[21] Section 850-b, as amended, renders immune from execution, within certain defined limits, the salaries of ordinary persons falling outside the classes (officials, ministers, public teachers, etc.) dealt with in §850-a. Like the immunity provided in §850-a, and subject to the same conditions and qualifications, this immunity is suspended in favor of one asserting a statutory claim to support. §850-b also provides for extending the exemption from execution to a larger sum or to a larger proportion of the employee's salary or wage where this is necessary to allow him to meet obligations to provide support.

services, be deemed to be due the debtor. In determining whether the conditions just mentioned are fulfilled, as well as in estimating the value of the services, all of the circumstances of the case are to be taken into consideration, including especially the nature of the services rendered, kinship or other relation existing between the person rendering the services and the recipient of them, and the economic condition of the latter."

The significance of these two provisions lies, first, in the fact that when the conditions prescribed in them are satisfied they make possible an immediate garnishment in favor of the "defrauded" creditor without compelling him first to engage in a time-consuming and expensive suit against the third person. A further significance lies in the fact that the presence of the prescribed conditions is itself determined in an informal procedure before the judge hearing the application for garnishment process.

D. Alimony and Income Taxation

The treatment of alimony payments for purposes of taxation, both from the standpoint of the obligor and that of the obligee, is worthy of brief mention.

In so far as the support provided exceeds the statutory liability of the obligor, as declared by the court, the payments are subject to the gift tax, the burden of which falls on the donor, in this case, the alimony obligor. According to Section 12 of the Income Tax Law of February 6, 1938 the obligor cannot deduct payments of alimony from his taxable income. Under some circumstances, however, he can secure a certain reduction in his taxes when he establishes that the payments represent for him an unusual burden. (§33) According to Section 22, alimony payments do not form a part of the taxable income of the recipient. The situation is altered, however, when the payments of alimony are continued without statutory ground, as for example in case of the remarriage of the obligee. In this case, the party paying them may deduct them from his taxable income, while the recipient must pay an income tax on them.[22]

III. STATISTICS

Unfortunately it has not been possible to obtain relevant statistics concerning the number, character, and disposition of the claims to alimony annually asserted in Germany. The existing official statistics are not so arranged as to yield the insights into social conditions which could be obtained from complete statistical information in this field.

The publications of the Statistical Office of the Reich do, however, give the number of divorces granted annually in Germany, subdivided according to the fault of the parties as found by the court. These figures are not without relevance to the subject of alimony, since according to the Civil Code alimony was granted only to an innocent spouse, and, where both spouses were at fault, no claim to alimony was granted at all.

[22] Reichsfinanzhof in REICHSSTEUERBLATT, 1933, p. 1008, and May 9, 1934, III, A, 58/34; JURISTISCHE WOCHENSCHRIFT, 1934, p. 139.

The figures for the last three years available are as follows:

Year	Total number of divorces granted	Reason for divorce: Fault of the husband	Fault of the wife	Both spouses at fault
1935	49,784*	9,805	22,946	17,033
1936	49,857*	9,730	22,774	17,353
1937	46,786	9,156	21,437	16,193

* The Saar is not included.

The figures given must, however, be used with great caution. Precisely because the Code made the claim to alimony dependent upon the court's finding concerning fault in the divorce proceeding, that proceeding was often consciously given a certain orientation, and fault was either artificially attributed or silently passed over in order to bring about the desired consequences for the financial claims between the spouses. Furthermore, the husband, in view of the social disadvantages to the wife resulting from an attribution of fault to her, may, in violation of the actual truth of the case, have assumed a part or all of the fault in those cases where the wife had waived any claim to alimony.

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